No. 86-1758

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WATERWAYS ASSOCIATION OF PITTSBURGH,
Appellant,

v.

HERSCHEL H. ROSE, III, STATE TAX COMMISSIONER OF WEST VIRGINIA,
Appellee,

On Appeal from the Circuit Court of Kanawha County of West Virginia

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I Whether the tax imposed by West Virginia Code § 11-15A-13 is an impermissible exercise of the State's jurisdiction over the interstate navigable waterways within that State, the construction, operation, maintenance, taxation, and regulation of which has been preempted by the Federal Government.

II Whether the tax imposed by West Virginia Code § 11-15A-13 is an unconstitutional burden on interstate commerce in violation of the Commerce Clause, Article I, Section 8, Clause 3, and the Due Process Clause of the United States Constitution.

III Whether the tax imposed by West Virginia Code § 11-15A-13 constitutes a Duty of Tonnage, prohibited by Article I, Section 10, Clause 3 of the United States Constitution.

IV Whether the tax imposed by West Virginia Code § 11-15A-13 is prohibited under the terms of the Northwest Ordinance of 1787 and the Virginia Compact of 1789.

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

The Waterways Association of Pittsburgh is made up of various companies, none of which are listed in the caption of this case. The members and their corporate relationships are as follows:

Allegheny Power Service Corporation

Allegheny Power Service Corporation is a wholly-owned subsidiary of Allegheny Power System, Inc. and is affiliated with the following Companies:

Allegheny Generating Company
Allegheny Pittsburgh Coal Company
Allegheny Power Service Corporation
Allegheny Power System, Inc.
Monongahela Power Company
The Potomac Edison Company
West Penn Power Company
West Penn West Virginia Water Power Company
West Virginia Power and Transmission Company

Allegheny Towing, Inc.

Allegheny Towing, Inc. does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries) and is not affiliated with any companies.

Bellaire Marine Services, Inc.

Bellaire Marine Services, Inc. does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries) and is not affiliated with any companies.

The Buncher Company

The Buncher Company does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries) and is not affiliated with any companies.

Campbell Barge Line, Inc.

Campbell Barge Line, Inc. is a wholly-owned subsidiary of Blue Danube and is affiliated with Haney Barge Line, Inc., Campbell Transportation Company, Upper Ohio Towing, Inc., and C & C Marine Maintenance.

Campbell Barge Line, Inc. does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries).

Consolidation Coal Company

Consolidation Coal Company is a wholly-owned subsidiary of Dupont and is affiliated with Fairmont Supply Company and Conoco Oil.

Consolidation Coal Company does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries).

Crain Brothers, Inc.

Crain Brothers, Inc. does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries) and is not affiliated with any companies.

Crounse Corporation

Crounse Corporation does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries) and is not affiliated with any companies.

Davison Sand & Gravel Company

Davison Sand & Gravel Company does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries) and is not affiliated with any companies.

Dravo Mechling Corporation

Dravo Mechling is a wholly-owned subsidiary of Dravo Corporation and is affiliated with the following companies:

Dravo Arabia, Ltd.
Dravo de Mexico
S.A. de C.V.
Dravo — Okura Company, Ltd.
Dravotec, S.P.A.
P. T. Triweger
Training Institute for Dredging, B.V.
Gibbs & Hill Espanola, S.A.
Gibbs & Hill Iran
Filipinas Dravo Corporation
Potomas Sand & Gravel
Lemont Harbor & Fleeting Services, Inc.
EFISA, S.A.
Chuchwal de Wenger
International, Ltd.
Gibsin Engineers, Ltd.
Q - G & H Chena, Ltd.
Capital City Stevedores
Stevedores, Inc.

Dravo Mechling does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries).

Freeport Terminals, Inc.

Freeport Terminals, Inc. is a wholly-owned subsidiary of Nicholas Enterprises and is not affiliated with any companies.

Freeport Terminals, Inc. does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries).

Haney Barge Line, Inc.

Haney Barge Line, Inc. is a wholly-owned subsidiary of Blue Danube and is affiliated with Campbell Barge Line, Inc., Campbell Transportation Company, Upper Ohio Towing, Inc., and C & C Marine Maintenance.

Haney Barge Line, Inc. does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries).

Indiana & Michigan Electric Company

Indiana & Michigan Electric Company is wholly-owned by American Electric Power Company, Inc. and is affiliated with the following companies:

Appalachian Power Company
American Electric Power Service Corporation
AEP Energy Services, Inc.
AEP Generating Company
Cedar Coal Co.
Central Appalachian Coal Company
Kanawha Valley Power Company
Southern Appalachian Coal Company
West Virginia Power Company
Columbus and Southern Ohio Electric Company
Colomet, Inc.
Conesville Coal Preparation Company, Inc.
Simco, Inc.
Franklin Real Estate Company
Indiana Franklin Realty, Inc.
Ohio Power Company
Blackhawk Coal Company
Price River Coal Co.
Kentucky Power Company
Kingsport Power Company
Michigan Electric Power Company
Michigan Power Company
Michigan Gas Exploration Co.
Cardinal Operating Company
Central Coal Company
Central Ohio Coal Company
Central Operating Company
Southern Ohio Coal Company
Windsor Power House Coal Company
Ohio Valley Electric Corporation
Indiana-Kentucky Electric Corporation
Twin Branch Railroad Company
Wheeling Electric Company

Indiana & Michigan Electric Company does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries).

Ingram Barge Company

Ingram Barge Company is a wholly-owned subsidiary of Ingram Industries, Inc. and is affiliated with the following companies:

Ingram Distribution Group, Inc.
Ingram River Equipment, Inc.
Ingram Towing Company
Ingram Transportation Company
Ingram Ohio Barge Company
Ohio Barge Line, Inc.
Tennessee Book Company
Ingram Periodicals, Inc.
IDG Financial Corporation
Ingram Service, Inc.
Ingram Software, Inc.
Ingram Software, Ltd.
Softeam, Inc.
Ingram Coal Company
Cravat Coal Export Company
Cravat Coal Export Company, Inc.
Tennessee Insurance Company
Ingram Financial Corporation
Ingram Management Company
Ingram Export Company
Johns Creek Coal Company
Resource Holdings, Inc.
Ingram Production Company
Ingram Terminal Company
RHI Corporation
Kondur Petroleum SA
Telecommunications Systems, Inc.
Ingram Petroleum Services, Inc.
Gulfco International Sales Corporation

Ingram Barge Company does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries).

M & O Marine, Inc.

M & O Marine, Inc. does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries) and is not affiliated with any companies.

M/G Transport Services, Inc.

M/G Transport Services, Inc. is a wholly-owned subsidiary of The Midland Company, and is not affiliated with any companies.

M/G Transport Services, Inc. does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries).

Mon River Towing, Inc.

Mon River Towing, Inc. is a subsidiary of Guttman Oil Company, the holding company for Mon River Towing, Inc., Guttman Realty, and Guttman Industrial Supply.

Mon River Towing, Inc. does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries).

The Ohio River Company

The Ohio River Company is a wholly-owned subsidiary of Midland Enterprises Inc., which is wholly-owned by Eastern Gas & Fuel Associates. The Ohio River Company is affiliated with the following companies:

Boston Gas Company
  Massachusetts LNG Incorporated
Boston Gas Products, Inc.
Charles Coal Company
Eastern Associated Capital Corp.
Eastern Associated Foundation (The)

Eastern Associated Real Estate Corp.
Eastern Associated Securities Corp.
Eastern Energy Systems Corp.
Eastern Exploration Corporation
Eastern Power Systems, Inc.
  Eastern Fairfield Corp.
Eastern Realty Corp.
Eastern Urban Services, Inc.
E G Leasing Corp.
Midland Enterprises, Inc.
  Boston Tow Boat Company
  Chotin Transportation, Inc.
  Eastern Associated Terminals Company
  Marine Equipment Company
  Midland Affiliated Company
  Federal Barge Lines, Inc.
    River Fleets, Inc.
  Capital Marine Supply, Inc.
  Hartley Marine Corp.
  Inland Water Propulsion Systems, Inc.
  Ohio River Terminals Company (The)
  Port Allen Marine Service, Inc.
  Omega Properties, Inc.
  Orgulf Transport Co.
  Red Circle Transport Co.
  United Barge Co.
    Heartland Transportation, Inc.
    Triangle Fleeting Corporation
Mystic Steamship Corporation
PCC Land Company, Inc.
Philadelphia Coke Co., Inc.
Western Associated Energy Corp.
  Delta Properties Corp.
  Eastern Associated Properties Corp.
  North Fork Energy Corp.
  Roaring Fork Coal Corp.
  Tremont Coal Corp.
  Western Associated Properties of Colorado Corp.

The Ohio River Company does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries).

Port Authority of Allegheny County

The Port Authority of Allegheny County does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries) and is not affiliated with any companies.

River Salvage Company, Inc.

River Salvage Company, Inc. does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries) and is not affiliated with any companies.

Shenango, Incorporated

Shenango, Incorporated is a wholly-owned subsidiary of the Boggs Group which is wholly-owned by the shareholders of the Aloe Coal Company.

Shenango, Incorporated does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries) and is not affiliated with any companies.

Union R.R. Company & Bessemer & Lake Erie Railroad Company

Union R.R. Company & Bessemer & Lake Erie Railroad Company is a subsidiary of U. S. X. and a sister company of Bessemer & Lake Erie Railroad.

Union R.R. Company & Bessemer & Lake Erie Railroad Company does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries).

Weirton Steel Corporation

Weirton Steel Corporation does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries) and is not affiliated with any companies.

Wheeling-Pittsburgh Steel Corporation

Wheeling-Pittsburgh Steel Corporation is the parent company of numerous wholly-owned subsidiaries and Harman Coal Company which is seventy-five percent owned. Harman Coal Company is currently in receivership.

The following companies are affiliates of Wheeling-Pittsburgh Steel Corporation:

Butler Brothers
Carryore, Ltd.
Empire Iron Mining Partnership
Hansand Steamship Corporation
Iron Ore Company of Canada
Itasca Pellet Company
Mesba-Cliffs Mining Company
Tilden Iron Ore Partnership
Wabush Iron Company, Ltd.
Wheeling-Nisshin, Inc.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WATERWAYS ASSOCIATION OF PITTSBURGH,
Appellant,

v.

HERSCHEL H. ROSE, III, STATE TAX COMMISSIONER OF WEST VIRGINIA,
Appellee,

On Appeal from the Circuit Court of Kanawha County of West Virginia

---

JURISDICTIONAL STATEMENT

Appellant, Waterways Association of Pittsburgh, appeals from the decision of the Circuit Court of Kanawha County, West Virginia rendered in this case on April 18, 1986, sustaining the validity of the tax imposed by West Virginia on the consumption of fuel by watercraft while plying the Ohio River within West Virginia. This jurisdictional statement is submitted to show that this Court has jurisdiction over this appeal and that substantial federal questions are presented.

OPINIONS BELOW

This case was commenced in the Circuit Court of Kanawha County, West Virginia as a declaratory judgment action seeking a determination that the fuel consumption tax on water-

craft be declared unconstitutional. The initial decision of the Circuit Court of Kanawha County, West Virginia, dated April 18, 1986, held the challenged tax valid from the date of its enactment through June 30, 1985. Because a reciprocal credit statute contained in the Multistate Tax Compact was repealed July 1, 1985, the tax was held to discriminate against interstate commerce. The Second Extraordinary Session of the 1986 West Virginia Legislature enacted Enrolled Committee Substitute for Senate Bill 1 to add West Virginia Code § 11-15A-10(a) which contained a new reciprocal credit provision to cure the discrimination. That court's decision holding the tax valid is not officially reported.

JURISDICTION

The West Virginia Supreme Court of Appeals refused to grant Appellant's Petition for Appeal by final order on February 3, 1987. A motion for leave to present a second application for appeal was filed March 2, 1987. This motion was denied on the grounds that it was filed out of time. A Notice of Appeal (Appendix A, infra, 1a) was timely filed with the Circuit Court of Kanawha County and with the West Virginia Supreme Court of Appeals on April 28, 1987 because of uncertainty as to the location of the record. The time within which to docket this appeal in this Court expires on May 3, 1987, and timely docketing has been made. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, art. I, § 8, cl. 3 (the Commerce Clause)

United States Constitution, art. I, § 10, cl. 3 (the Duty of Tonnage Clause)

United States Constitution, art. VI, cl. 2 (the Supremacy Clause)

United States Constitution, amend. XIV, § 1, cl. 4 (the Equal Protection Clause)

26 U.S.C.

28 U.S.C.

33 U.S.C.

Northwest Ordinance of 1787

The Virginia Compact of 1789

West Virginia Code § 11-15-13

West Virginia Code § 11-15A-13

West Virginia Code § 11-15-18

Enrolled Committee Substitute for Senate Bill No. 1

The text of each citation appears at Appendix D, infra, pp. 17a-40a.

STATEMENT OF THE CASE

1. Proceedings Below, Federal Questions Raised

Appellant challenges the validity of the excise tax imposed by West Virginia Code § 11-15A upon consumption of fuel by watercraft while plying the navigable waterways within the state of West Virginia. Appellant contends this tax violates provisions of the United States Constitution, the Northwest Ordinance, and the Virginia Compact.

Appellant's members are engaged in the business of transporting products by barge and other watercraft in interstate commerce on the inland waterways, including those parts of the Ohio River that are in West Virginia, on other navigable rivers of the State and on navigable rivers outside West Virginia. Since April 1, 1983, West Virginia has imposed an excise tax on the ". . . consumption in this state of gasoline or special fuel purchased outside the state at the rate of five percent of the average wholesale price of such gasoline or special fuel," on "motor carriers." The term "motor carrier" includes "watercraft."

Appellant filed a Complaint for Declaratory Judgment action in the Circuit Court of Kanawha County, West Virginia, seeking a determination by the Circuit Court that House Bill 1657, enacted by the West Virginia Legislature on February 18, 1983, amending Articles 15 and 15A of Chapter 11 of the West Virginia Code, violated provisions of the United States Constitution, the Northwest Ordinance and the Virginia Compact.

The Circuit Court ruled that the statute in question does not violate the Northwest Ordinance; is not a duty of tonnage prohibited by Article I, Section 10, Clause 3 of the United States Constitution; does not violate the Commerce Clause, Article I, Section 8, Clause 3 of the United States Constitution; and that the statute is constitutional and valid in every respect between the date of its enactment and June 30, 1985. On July 1, 1985, the reciprocal credit statute contained in the Multistate Tax Compact was repealed. The Court ruled that

after that date, West Virginia Code § 11-15A-13 discriminated against interstate commerce and was, therefore, unconstitutional because of no reciprocal credit with other states. The Second Extraordinary Session of the 1986 Legislature enacted Enrolled Committee Substitute for Senate Bill 1 adding West Virginia Code § 11-15A-10a which contained a reciprocal credit provision to cure the discrimination found by the Court. This corrective legislation, however, does not affect Appellant's challenge to the Circuit Court's decision.

Appellant seeks review of the Circuit Court's decision and final order upholding the validity of West Virginia Code § 11-15A.

2. Statement of Facts

On February 18, 1983, the West Virginia Legislature passed House Bill 1657, amending Articles 15 and 15A of Chapter 11 of the West Virginia Code (hereinafter sometimes referred to as "House Bill 1657"). House Bill 1657 became effective April 1, 1983, and provides for imposition of a tax on the sale, use or consumption in West Virginia of gasoline or special fuel.

West Virginia Code § 11-15A-13(a)(2) imposes an excise tax on the "use or consumption in this State of gasoline or special fuel purchased outside this State at the rate of 5% of the average wholesale price of such gasoline or special fuel," with a minimum price for purposes of computation of the tax fixed by the statute at 97¢ per gallon.

The computation of the fuel use tax to be paid by appellant's members requires a determination of all fuel used in West Virginia and sales tax paid on fuel purchased in the State. The amount of tax remitted is equal to the difference between the gross amount of tax calculated on all fuel used in West Virginia and the amount of sales tax paid on any of the fuel purchased in the State.

West Virginia Code § 11-15A-13(d) proscribes the steps for calculating the fuel use tax as follows:

> Every person who operates or causes to be operated a motor carrier in this State shall pay the tax imposed by this section on the average wholesale price of all gallons of gasoline or special fuel used in the operation of any motor carrier within this State, under the following rules:
>
> (1) The total amount of gasoline or special fuel used in the operation of the motor carrier within this State shall be that proportion of the total amount of gasoline and special fuel used in any motor carrier's operations within and without this State, that the total number of miles traveled within this State bears to the total number of miles traveled within and without this State.
>
> (2) A motor carrier shall first determine the gross amount of tax due under this section on the average wholesale value, determined under subsection (c), of all gasoline and special fuel used in the operation of the motor carrier within this State during the preceding quarter, as if all gasoline and special fuel had been purchased outside this State.
>
> (3) Next, the taxpayer shall determine the total tax paid under article fifteen of this chapter on all gasoline and special fuel purchased in this State for use in the operation of the motor carrier.
>
> (4) The difference between (2) and (3) is the amount of tax due under this article when (2) is greater than (3), or the amount to be refunded or credited to the motor carrier when (3) is greater than (2), which refund or credit shall be allowed in the same manner and under the same conditions as a refund or credit is allowed for the tax imposed by article fourteen-A of this chapter.

West Virginia Code § 11-15-18(c)(6) defines "motor carrier" to include "any aircraft, barge or other watercraft or locomotive transporting passengers or freight in or through this State."

Some of Appellant's members are motor carriers within the meaning of West Virginia Code § 11-15-18(c)(6) who are engaged in the business of transporting products by watercraft in interstate commerce on those parts of the Ohio River that are in the State of West Virginia, on other navigable rivers of the State, and on the Ohio River and other navigable rivers outside West Virginia.

The United States government has sole responsibility for the regulation, servicing and maintenance of the navigable waterways of which the Ohio, Kanawha, Big Sandy, and Monongahela Rivers are a part. The federal government also regulates and documents all vessels operated by Waterways Association members which travel on the navigable waters of the United States, including those within West Virginia. The sole means of power for the watercraft employed by Appellant's members in West Virginia waters is gasoline or special fuel as defined in West Virginia Code § 11-15-18(c). The amount of fuel consumed by the watercraft increases as the size and weight of the vessel increases.

The 1983 tax statute requires Appellant's members to pay taxes on the consumption of fuel in West Virginia even though they have no contact with West Virginia other than navigating in West Virginia waters. For example, a barge operated by a member of Waterways Association which leaves Pittsburgh, Pennsylvania, and travels to Cincinnati, Ohio, without stopping in West Virginia, is required to pay the tax on all fuel consumed while traveling that portion of the Ohio River in West Virginia waters. West Virginia Code §§ 11-15-18(g) and 11-15A-13(g) provides that all taxes collected under the provisions of House Bill 1657 must be used only for the construction, repair and maintenance of highways in West Virginia.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This case presents substantial federal questions as to the power of the states to impose taxes that are prohibited by Congress. This is a matter of important national policy and constitutional doctrine. Maintenance of a navigable inland waterway system has long been recognized as vital not only to our economic development but also to the national defense. The tax imposed by West Virginia upon the consumption of fuel by watercraft plying the Ohio River through that state violates the Commerce Clause, the Due Process Clause, and the Duty of Tonnage Clause. The decision of the Circuit Court of Kanawha County upholding the tax is in irreconciliable conflict with this Court's opinions in *Helson* v. *Kentucky*, 279 U.S. 245 (1929), and *General Motors Corp.* v. *Washington*, 377 U.S. 436 (1964).

West Virginia has found a means of exacting a windfall tax from watercraft which has no connection to that state other than using the navigable waterways of that state. The creation, maintenance, improvement, regulation of navigable waterways, and taxation of water transportation has long been preempted by the Federal Government. Failure by this Court to consider this appeal would encourage other states along the Ohio and other navigable waterways to impose like taxes, which would stifle the flow of goods in interstate commerce. The questions presented by this appeal are, therefore, of substantial national importance. Review by this Court is necessary to assure that the inland waterways remain free from state control through the imposition of taxes which contravene the Commerce Clause, the Due Process Clause, the Duty of Tonnage Clause, and the Supremacy Clause of the United States Constitution.

I. JURISDICTION OF NAVIGABLE WATERWAYS INCLUDING THE JURISDICTION TO MAINTAIN, IMPROVE, REGULATE, AND TAX HAS BEEN PREEMPTED BY THE FEDERAL GOVERNMENT

The Federal Government has from the adoption of our Constitution preempted the creating, maintaining, improving, and regulating an inland waterway system which includes jurisdiction over navigable waterways. The utilization of our navigable waterways has played a vital role in the development of our country and especially the free flow of commerce among the various states. The inland waterways continue to play a vital role and the Federal Government has continued to maintain jurisdiction over navigable waterways pursuant to the Supremacy Clause of the Constitution. Art. VI, cl. 2.

For many years there was no separate taxation levied at the federal level designed to defray the cost of creating and improving the inland waterways. The Federal Government has now preempted the taxation of fuel use and consumption on inland waterways. The purpose of the tax is to raise the tax funds for the construction and rehabilitation of the inland waterway system in much the same fashion as taxes on fuel consumed by other motor carriers for maintaining roads and airports.

Title 26 U.S.C. § 4042 has imposed a tax on fuel used or consumed in river transportation for the purpose of raising revenue to construct and rehabilitate navigable waterways, including the Ohio River (from junction with the Mississippi River at RM 0 to junction of Allegheny and Monongahela Rivers at Pittsburgh, Pennsylvania at RM 0 981) as well as the navigable rivers within the state of West Virginia. 33 U.S.C. § 1804.

The Inland Waterways Revenue Act of 1978, Pub. L No. 95-502, 92 Stat. 1696 codified at 33 U.S.C. 1801-1804 (1982) 26 U.S.C. § 4042 (1982) represents the first tax measure ap-

plicable to users of inland waterways in the history of the United States. The act imposes a tax on fuel used by vessels and employed in commercial waterway transportation on any of 26 listed inland or intercoastal waterways. The revenues collected under the act are placed in an Inland Waterways Trust Fund to be used for construction and rehabilitation for navigation on the 26 waterways. The tax is referred to in the legislative history as a user tax. In hearings before the Congress *User Taxes for the Inland Waterways of the United States: Hearings on HR 8309 House Committee on Ways and Means, 95th Congress, 1st Session 2 (1977)*, Senator Stevenson pointed out that "a goal of the bill was to recover maintenance and construction costs and/or achieving intermodal equity by forcing waterway transport to pay its way like other modes of transport." The legislative history makes it clear that the jurisdiction over inland waterways, including the power to tax interstate commerce operating within that system has been preempted by the Federal Government. The Appellant recognizes, however, that this preemption has been held by this Court not to prohibit state and local revenue measures that operate *only* to compensate for benefits *actually* supplied. *Massachusetts* v. *United States*, 435 U.S. 444 (1978); *Helson* v. *Kentucky*, 279 U.S. 245 (1929). In *Cannon* v. *New Orleans*, 20 Wall, 577 (1874), this Court held that when an ordinance taxed wharves and or riverbanks indiscriminately rather than only the use of wharves built by the city, the exaction could not be justified as compensation for use of municipal facilities or services. It is clear in the instant case that the State of West Virginia provides no benefits to watercraft plying the Ohio River along its borders. Moreover, it is equally clear that the State of West Virginia does not in fact intend to utilize any funds raised by this tax to provide benefits to waterway users as the funds can only be used for West Virginia highways.

II. THE TAX IMPOSED BY WEST VIRGINIA CODE § 11-15A-13 IS AN UNCONSTITUTIONAL BURDEN ON INTERSTATE COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE AND THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

West Virginia Code § 11-15A-13 imposes a tax on fuel consumed within the State of West Virginia by motor carriers. The term "motor carrier" as defined by the statute includes "a barge or other watercraft transporting passengers or freight in or through West Virginia." The tax imposed is calculated at five percent of the "average wholesale price" of fuel consumed. The revenue generated by this tax is dedicated to the repair and maintenance of the highways in West Virginia.

This tax as applied to the members of Waterways Association is an impermissible burden on interstate commerce in violation of the Commerce Clause and Due Process Clause of the Constitution of the United States.

This issue was addressed in *Helson* v. *Kentucky*, 279 U.S. 245 (1929) which presented a factual pattern very similar to that presented by the instant case. In that case the Commonwealth of Kentucky sought to impose a tax upon fuel consumed in Kentucky waters of the Ohio River by a ferryboat while traveling to and from the Commonwealth of Kentucky and the State of Illinois. The principal office and place of business of Helson, the taxpayer in that case, was within the State of Illinois. The fuel consumed by the ferryboat was purchased in the State of Illinois. However, seventy-five percent of the total fuel purchased for use by the ferryboat was consumed in Kentucky waters in connection with its river transportation business of making interstate journeys to and from Illinois and Kentucky. The Court found in that case the "tax is exacted as the price of the privilege of using an instrumentality of interstate commerce" and accordingly held that the tax was invalid.

In that case the ferryboat actually came to rest in the Kentucky waters of the Ohio River for the purpose of picking up and discharging passengers and cargo. In the instant case the State of West Virginia has exacted a tax on fuel consumed by watercraft while traveling the Ohio River notwithstanding the watercraft does not stop in West Virginia or have any contact with West Virginia. The West Virginia tax like the Kentucky tax is clearly a "tax exacted as the price of the privilege of using an instrumentality of interstate commerce."

Since *Helson*, the issue of whether a state tax is an impermissible burden on interstate commerce has been addressed in numerous factual settings. Those cases have fashioned tests that address Commerce Clause questions, Due Process Clause questions and Supremacy Clause questions.

As a prerequisite to taxation of interstate activities, due process requires a sufficient nexus between the taxing state and the activity which is being taxed. *General Motors Corp.* v. *Washington*, 377 U.S. 436 (1964); *Northwestern States Portland Cement Company* v. *Minnesota*, 358 U.S. 450 (1959).

While the Commerce Clause is not a barrier to state taxation of interstate commerce, such tax must relate to its fair share of support of state government. This clause, however, continues to protect interstate commerce from windfall taxes exacted by states which bear no relationship to benefits provided by the state. To insure that interstate commerce is not improperly burdened by state taxation, this Court has fashioned the following tests:

(1) the tax is applied to activities having substantial nexus with the state;

(2) the tax is fairly apportioned;

(3) the tax does not discriminate against interstate commerce; and

(4) the tax is fairly related to the services provided by the state.

Maryland v. *Louisiana*, 451 U.S. 725 (1981); *Department of Revenue* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978); *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977).

West Virginia Code § 11-15A-13 requires Waterways Association members to pay a tax on fuel consumed as they travel navigable waterways in and bordering West Virginia even though they have little or no connection with West Virginia. A review of the relevant facts as stipulated by the parties and the state statutes demonstrates conclusively that the tax at issue fails both the "substantial nexus" and the "fairly related to services provided" parts of the test and is, therefore, an impermissible burden on interstate commerce.

A. THE RIVER TRANSPORTATION BUSINESS OF WATERWAYS ASSOCIATION'S MEMBERS DOES NOT HAVE A SUBSTANTIAL NEXUS WITH WEST VIRGINIA

Under both the Commerce Clause and the Due Process Clause, the first question to be addressed in determining the constitutionality of the tax imposed by West Virginia Code § 11-15A-13 is whether the barge transportation activities of the members of Waterways Association have a substantial nexus with West Virginia.

It is necessary to look to the contact between the taxing state and the *transaction* it seeks to tax and not simply to the contact of the taxpayer with the state to determine whether there is the required nexus. Unless some local incident occurs sufficient to bring the transaction within the taxing power of the state, the vendor cannot be taxed on such transactions. *Norton Co.* v. *Dept. of Revenue*, 340 U.S. 534, 537 (1951). The mere entry into a state by a corporation does not take away from it the right to do interstate business with tax immunity. *General Motors Corp.* v. *Washington*, 377 U.S. at 448.

In *American Oil Company* v. *Neill*, 380 U.S. 451 (1965), the Court considered whether a per gallon excise tax imposed by Idaho was applicable to fuel delivered to the purchaser outside the state and thereafter transported to Idaho for use. The taxpayer was a licensed dealer in Idaho and carried on business activities in the state. The Court held that the activities surrounding the particular transaction the state sought to tax had to be examined to determine if the nexus required by constitutional due process was present. The Court observed that when a corporation enters a state and proceeds to do business there is a strong inference that the necessary "link" exists between the state and transactions which result in economic benefits from customers within the state. The Court nevertheless held that the imposition of the tax violated the due process clause, stating:

> The corporation can, however, exempt itself by a clear showing that there are no in-state activities connected with out-of-state sales. In such instances, the transactions are said to be "dissociated from the local business," 340 U.S. at 537, 95 L.Ed. at 521, and therefore may not, consistent with due process, be taxed. 380 U.S. at 458.

The "transaction" of the members of Waterways Association for which House Bill 1657 imposes the subject tax is the consumption of fuel (which may have been purchased outside the State of West Virginia) while traveling on the navigable waterways in, around and through West Virginia. This transaction is "dissociated from the local business" because the tax does not depend on any "local event" occurring prior to the imposition of the tax. The only "local event" in West Virginia is the consumption of fuel, which is an integral part of interstate transportation and indeed provides the motive power for such commerce. When the tax is imposed on traffic of Waterways Association members, it is a tax on an instrumentality totally in interstate commerce, without any "local event" to connect the transaction with the state. Under these circumstances, the tax must fail.

Numerous fuel tax cases have been considered by this Court involving Commerce Clause issues. Taxes have been sustained when the Court determined that the incidence of the tax was storing, selling, or withdrawing the fuel from storage—all local events. In *Nashville, Chattanooga & St. Louis Railway* v. *Wallace*, 288 U.S. 249 (1933), a Tennessee tax on the privilege of selling, storing, or distributing gasoline was sustained against a challenge that the gasoline which the taxpayer brought into the state was used in its business as an interstate carrier and the tax, therefore, constituted an unconstitutional burden on interstate commerce. The Court held that the gasoline was taxable because it had come to rest within the state (in storage), notwithstanding its prospective use as an instrument of interstate commerce.

The same result was reached in *Eastern Air Transport, Inc.* v. *South Carolina Tax Commission*, 285 U.S. 147 (1932), where the incidence of the tax was the sale of gasoline within the state, and in *Edelman* v. *Boeing Air Transport, Inc.*, 289 U.S. 249 (1933), where the tax applied upon withdrawal of fuel from storage. The Court reasoned in each case that the event giving rise to the tax, whether storage, sale or withdrawal from storage, was completed either after the interstate journey had ended or before use in interstate commerce began. The Court thus found a completed local event to which the tax attached and thus interstate commerce to which the fuel may have been subsequently dedicated was not the incidence of taxation. In each of the foregoing cases the Court recognized the distinction between the incident of taxation tied to a local event such as storage and a tax, such as the one at issue in this case, that is directly upon the consumption of fuel in interstate commerce which does not involve any such local event. The Court in *Helson* v. *Kentucky*, 279 U.S. 245 (1929) and *Bingaman* v. *Golden Eagle Western Lines*, 297 U.S. 626 (1936) makes the distinction clear.

In *Bingaman*, the Court held that an excise tax upon the use of motor fuel purchased in, and brought from, another

state and used only in an interstate bus transportation business was invalid as imposing a direct burden on an instrumentality of interstate commerce. The state argued that the tax was compensation for use of its highways, but the New Mexico Supreme Court had previously reviewed the statute and found it to be a general excise tax on the use of all gasoline in the state; and even though the proceeds of the tax were devoted to the building and improvement of state highways, the Court found that this did not alter the fact that the tax was not enacted for the privilege of using the highways.

Helson and *Bingaman* cannot be distinguished from the instant case. The tax imposed by West Virginia Code § 11-15A-13 is a general excise tax on the use and consumption of fuel in West Virginia. The incidence of taxation is consumption of fuel while using an instrumentality of interstate commerce, i.e., the Ohio River. West Virginia has utilized its position to impose a tax on captive users of a vital navigable waterway, which tax is nothing more than an exaction for the "privilege of using an instrumenatlity of interstate commerce" which is unequivocably prohibited by *Helson*.

Helson was reaffirmed by the Court in *United Airlines* v. *Mahin*, 410 U.S. 623 (1973). Although upholding a use tax on fuel stored at an airport and loaded onto airplanes for travel in interstate commerce, the Court nonetheless recognized that "fuel cannot be taxed by . . . the State in which it is merely consumed." 410 U.S. at 630. The Court utilized a "local event" analysis to sustain the Illinois tax.

> Multiple taxation and tax windfalls are avoided because only one State — the State of storage before loading — has a local event under which a tax is imposed. Under *Helson*, States over which the planes fly will be unable to impose a tax on mere consumption. 410 U.S. at 631.

The tax at issue here cannot escape this prohibition. By its terms, the tax is applicable to all traffic on the navigable

waterways, even though it may be totally interstate in character. It is a tax on the "mere consumption" of fuel in interstate commerce, which is specifically prohibited by *Helson*, *Bingaman* and *United Air Lines* as an undue burden on interstate commerce in violation of Article I, Section 8, Clause 3 of the United States Constitution. If every state through which barge traffic passed on a trip from Pittsburgh to New Orleans sought to reap the benefits of a windfall tax similar to West Virginia's fuel use tax, the cumulative burden on interstate commerce would be confiscatory and would indeed destroy a vital federal program of maintaining a viable inland waterway system, a result the Commerce Clause is designed to prevent.

B. THE TAX ASSESSED IS NOT FAIRLY RELATED TO SERVICES RENDERED BY THE STATE.

The fourth part of the Complete Auto test is that the tax must be fairly related to the services provided by the state.

In *Evansville-Vanderburgh Airport Authority* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972), the Court addressed the constitutionality of statutes that imposed a fee upon the enplaning of certain passengers at an airport. The funds collected were to be used to help defray the costs of airport maintenance and construction. In sustaining the tax, the Court set forth the following test:

> (W)hile state or local tolls must reflect a "uniform, fair, and practical standard" relating to public expenditures, it is the amount of the tax, not its formula, that is of central concern. At least so long as the toll is based on some fair approximation of use or privilege for use . . ., and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facilities by individual users. 405 U.S. at 716-717.

Although decided prior to *Complete Auto*, the Court applied both the discrimination and "fairly related" element of that test. The Court reasoned that because both interstate and intrastate passengers were subject to the tax, there was no discrimination present. 405 U.S. at 717. The Court further held that the "charges reflect a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed," *Id.*

The test formulated in *Delta Airlines* shows conclusively that the tax imposed by West Virginia Code § 11-15A-13 is an impermissible burden on interstate commerce. Although the statute satisfies the first part of the test because it is equally

applicable to interstate as well as intrastate traffic, the statute fails to comply with the "fairly related" test for two reasons. First, the revenue generated by the statute does not represent a fair value of facilities maintained for the use and benefit of the taxpayer. The taxes collected from the members of Waterways Association under West Virginia Code § 11-15A-13 for their consumption of fuel on the navigable waterways are designated for the construction, repair and maintenance of West Virginia *highways*. The members of the Association do not use the highways in their business of water transportation by barge. In those instances where goods or employees are transported to or from barge loading points, fuel use tax is paid on the fuel consumed in that separate transportation.

Waterways Association members are taxed on the consumption of fuel purchased in another state and consumed while traveling through the State of West Virginia on the navigable waterways of the United States. The waterways which are within the exclusive jurisdiction of the federal government are regulated, constructed, operated, and maintained by the federal government. The members are required to fund a project from which they do not benefit, which is expressly prohibited by the test set forth in *Delta Airlines*.

The second reason the "fairly related" test is not met is that the tax paid by the Waterways Association members is excessive in relation to the costs incurred by the taxing authority. Navigable waterways are maintained by the Federal government. The State of West Virginia incurs no expense for the maintenance of the navigable waterways.

"The Court has continued to scrutinize taxes on interstate commerce that are designed to reimburse the State for the particular costs imposed by that commerce." *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 647, n. 13, (1981) Blackmun, J., dissenting. In *Ingels* v. *Morf*, 300 U.S. 290 (1937), the Court addressed a challenge to a state statute that required the payment of a license fee for the movement over the highways of motor vehicles from without the state for purposes of sale. The Court held:

> To justify the exaction by a state of a money payment burdening interstate commerce, it must affirmatively appear that it is demanded as reimbursement for the expense of providing facilities, or of enforcing regulations of the commerce which are within its constitutional power. 300 U.S. at 294.

The Court overturned the statute at issue in *Ingels* because the state failed to show that the revenue was used to "meet the cost of the construction or mainenance of its highways." *Id.* at 295, or would have reimbursed the state for a service provided to the taxpayer.

The circumstances presented by House Bill 1657 are even more egregious than those present in *Ingels*. The fuel use tax found in West Virginia Code § 11-15A-13 is a single revenue purpose statute.

There is no evidence that traffic on the navigable waterways has any impact on the highways of West Virginia. For example, the law requires a barge line (or vessel) traveling from Pittsburgh to New Orleans to pay to the State of West Virginia a tax for the privilege of passing through the state measured by the fuel that it consumes while traveling the Ohio River within the state or along its borders even though that barge line may never stop in West Virginia and the company operating the barge line may have no connection with West Virginia other than traveling on the Ohio River.

A tax which exacts revenues from barge lines for travel in interstate commerce to maintain highways in West Virginia, when such carriers have no use for the roads and no other relationship to West Virginia, is an impermissible burden on interstate commerce. This tax is precisely that which the fairly related test forbids as it is a use tax having a special, limited purpose unrelated to river transportation.

III. THE TAX IMPOSED BY HOUSE BILL 1657 CONSTITUTES A DUTY OF TONNAGE, PROHIBITED BY ARTICLE I, SECTION 10, CLAUSE 3 OF THE UNITED STATES CONSTITUTION.

Article I, Section 10, Clause 3, of the United States Constitution provides that "no state shall, without the consent of Congress, lay any duty of tonnage." This explicit limitation on state power was enshrined in the Constitution to settle a dispute over whether such duties would be prohibited by the Commerce Clause. The debate originated at the Constitutional Convention on September 15, 1787, when Maryland delegates McHenry and Carrol, considering the unique needs of the Chesapeake Bay region, urged that "no state shall be restrained from laying duties of tonnage for the purposes of clearing harbors and erecting lighthouses." *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 419 (1946), fn. 17, *quoting* Farrand, *Records of the Constitutional Convention of 1787*, Volume 2, 625-626 (1937). Ultimately, however, Mr. Langdon prevailed with his argument that "the regulation of tonnage was an essential part of the regulation of trade, and the states ought to have nothing to do with it," *Id;* (see also *Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261 (1935), at 265, n. 1), and the Convention chose to provide explicitly for a prohibition on state duties of tonnage.

The first case decided by the United States Supreme Court concerning the tonnage taxes was *State Tonnage Tax Cases*, 12 Wall. (U.S.) 204 (1870). The case dealt with an Alabama statute passed in 1866 levying a tax at the rate or $1.00 per ton on steamboats and other watercraft plying the navigable waters of the state. The Court found that if the states, without consent of Congress, taxed vessels as instruments of commerce, by a tonnage duty or indirectly by imposing the tax upon the master or crew, they assume a jurisdiction which they do not possess and which falls directly within the prohibition of the Constitution. Recognizing that well-settled law supports the proposition that commerce comprehends navigation and extends to every type of commercial inter-

course between the several states, the Court concluded that the tax was in fact a prohibited duty of tonnage because it was not applied unless the vessels were plying the navigable waters of Alabama.

In later cases, charges imposed against water transportation vessels have been upheld where the charge had some direct relationship to a facility or service supplied by the taxing authority. *Northern Line Packet Co.* v. *Keokuk*, 95 U.S. 80 (1877); *Clyde Mallory Lines.* In *Keokuk*, the Court describes the intent of the constitutional prohibition of a duty of tonnage as being "to protect the freedom of commerce, and nothing more."

In *Mallory*, the duty of tonnage prohibition was described as follows:

> Hence, the prohibition against tonnage duties has been deemed to embrace all taxes and duties regardless of their name or form, even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port . . . . 296 U.S. at 265-266.

A barge towboat cannot navigate in West Virginia waters without being subjected to the tax, because fuel is consumed in navigation and any consumption of fuel in the state is subject to the tax. West Virginia could accomplish the same thing by placing a toll booth at the upper and lower reaches of the Ohio River to collect tolls from interstate barge operators using a waterway maintained by the Federal Government as a highway of commerce.

The dispositive factors in each case addressed by the Supreme Court of the United States involving a duty of tonnage issue is the presence or absence of an identifiable "quid pro quo" for which the state is justified in demanding compensation. The method of computing a tax, "even though not measured by the tonnage of the vessel," *Id.*, does not determine its validity. *Southern S.S. Co.* v. *Portwardens*, 73 U.S.

31 (1867); *Parkersburg & O. R. Transportation Co.* v. *City of Parkersburg*, 107 U.S. 691 (1883); *Clyde Mallory Lines.*

Under these circumstances, three aspects of the Duty of Tonnage Clause should be emphasized.

First, the debates of the Constitutional Convention make it abundantly clear that state duties, even for such vital services as lighthouses and harbor clearing, were to be prohibited under the Constitution.

Second, where such fees were absolutely necessary to facilitate commerce, they could be imposed only "with the consent of Congress." The prohibition against state duties, together with the provision for the consent of congress, establishes a strong presumption against the validity of any state duties. Where there are obvious benefits conferred, such as wharfage, *Keokuk*, or the use of a lock and dam, *Huse* v. *Glover*, 119 U.S. 453 (1886), the Court may dispense with the requirement of congressional consent. But where the benefits alleged to justify the duty are speculative, and there is greater likelihood of interference with interstate commerce, the constitutional requirement of congressional approval should be strictly enforced. *Southern S.S. Co.; Cannon* v. *City of New Orleans*, 87 U.S. 577 (1874).

Third, every Tonnage Clause case decided in this Court is entirely consistent with the proposition that, where the benefits to water carriers are speculative, the conduct of the carriers themselves indicates whether the state services do indeed facilitate commerce, *provided* that the carriers have free choice in deciding whether or not to avail themselves of such state services. That is, if a vessel's master determines that a wharf or harbor has no value to him, he can pass it by, but if he chooses to use the facility, he cannot complain that the rates are excessive, *Parkersburg*.

In the instant case, vessels have no choice but to pay the tax imposed by West Virginia Code § 11-15A-13 or discontinue their use of this vital avenue of interstate commerce. The fuel use tax is imposed merely because the barges have to travel

the navigable waterways in West Virginia. This tax is prohibited under these circumstances as a Duty of Tonnage.

The rationale of the lower Court in holding that the tax is not a duty of tonnage is flawed, both factually and legally. The Court found that "the taxes exacted by the challenged statute are exactions which help defray the cost of services provided by the State, such as police and fire protection," in the face of a statutory mandate that the proceeds of the tax be dedicated solely to West Virginia's *highways*.

The State of West Virginia, positioned as it is on the Ohio River, a great artery of interstate commerce, has leveraged its location into a revenue generating tool, and in effect taxes interstate commerce for no reason but to raise revenue. This tax has precisely the result that is proscribed by the Constitution which prohibits duties of tonnage.

IV THE TAX IMPOSED BY HOUSE BILL 1657 IS PROHIBITED UNDER THE TERMS OF THE NORTHWEST ORDINANCE OF 1787 AND VIRGINIA COMPACT OF 1789

The Northwest Ordinance and the Virginia Compact requires that the tax be invalidated. These statutes provide in pertinent part:

The Northwest Ordinance

> (T)he navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost or duty therefor.

The Virginia Compact

> (T)hat the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this Commonwealth lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdictions of this Commonwealth and of the proposed state on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river.

The language shows a clear intent to prohibit the State of West Virginia from collecting the fuel use tax from users of the Ohio River.

The Northwest Ordinance was enacted by the Confederate Congress on July 13, 1787, to provide "for the government of the territory of the United States northwest of the River Ohio," which later became the present States of Ohio, Michigan, Illinois, Indiana and Wisconsin. These lands

which had been subject to conflicting claims of Virginia, Massachusetts, Connecticut, and New York during the early 1780's ceded to the Congress. Virginia, for her part, resolved on January 2, 1781, to yield "all right, title, and claim . . . to the lands northwest of the Ohio River," *10 Hening 564*, subject to certain conditions annexed to the act of cession. See *Va. Rev. Code 1819, p. 39.* These conditions were not entirely satisfactory to the Congress which responded with an act dated September 13, 1783, stipulating the terms on which it would accept the cession of lands from Virginia. On December 20, 1783, the Virginia General Assembly accepted Congress' stipulated terms and authorized its delegates in Congress to convey Virginia's title in the northwest territory to the United States. *Id.* Ultimately, the Virginia delegates executed a deed of cession to the United States, dated March 1, 1784, conveying "all rights, title, and claim, of soil as well as of jurisdiction, which the said Commonwealth hath to the territory or tract of country within the limits of the Virginia Charter, situate lying, and being, to the northwest of the River Ohio." *11 Hening 571.*

After enacting two early ordinances for the temporary government of this Territory (April 23, 1784) and for the disposal of lands in the territory (May 20, 1785), Congress passed the Ordinance of 1787 (Northwest Ordinance) to create territorial government, to provide for the formation of three to five new states in that territory at a later date, and to declare certain "Articles of Compact, between the original States and the people and States in the said territory, [which were to] remain forever unalterable unless by common consent . . ." *Act of Confederate Congress, July 13, 1787, reprinted in Am. Jur. 2d Desk Book, Document 5.* Among these articles of compact, Article IV provides that "the Navigable waters leading into the Mississippi and the St. Lawrence, and the carrying places between the same, shall be common highways, and forever free as well to the inhabitants of said territory as to the citizens of the United States, . . . without any tax, impost, or duty therefore." Article V provided for the formation of new states, which were to

be admitted by its delegates into the Congress of the United States, on an *equal footing* with the original states in all respects whatever; and were to be at liberty to form a permanent constitution and State government: "*provided*, the constitution and government, to be formed, shall be . . . in conformity to the principals contained in these articles . . ." The Article V provision for the formation of three to five new states conflicted with one of the conditions expressed in Virginia's deed of cession; to correct the defect, Virginia specially ratified and confirmed Article V of the ordinance on December 30, 1788. Va. Rev. Code 1819, p. 41. Almost immediately after the Federal Constitution was ratified, Congress re-enacted the Northwest Ordinance, in all parts relevant here, on August 7, 1789. 1 Stat. 50.

The Virginia Compact was enacted by the General Assembly on December 18, 1789, to provide for "the erection of the District of Kentucky into an independent state." Va. Rev. Code 1819, p. 59. Congress consented on February 9, 1791, 1 Stat. 189, and Kentucky was admitted into the Union.

Section 11 of the Virginia Compact provides "that the use and navigation of the River Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this Commonwealth lies thereon, *shall be free and common to the citizens of the United States, and the respective jurisdiction of this Commonwealth and of the proposed state on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river.*" (Emphasis supplied.)

When West Virginia achieved statehood in 1863, the first Constitution of the State describes the jurisdiction over the bed, banks, and shores of the Ohio River as being that which was "heretofore reserved by, or vested in the State of Virginia, . . ." *West Virginia Constitution, Art. II, Section 1.* Therefore, any limitations or restrictions that were imposed upon Virginia by the Northwest Ordinance and the Virginia Compact were inherited by West Virginia. The State's

jurisdiction over rivers was later incorporated into W. Va. Code § 1-1-2 which provides:

> The jurisdiction of this State also extends over all the rivers which are boundary lines between this and any other state, to the opposite shore, *where there is no statute or compact to the contrary.* (Emphasis added.)

This statute was first enacted in 1868 and remains unchanged. The law clearly recognizes the fact that compacts dealing with rights to and jurisdiction over rivers are superior to unilateral action by West Virginia asserting its jurisdiction over waterways within its boundaries.

In *Economy Light and Power Company* v. *United States*, 256 U.S. 113 (1921), the Supreme Court discussed the provisions of the Northwest Ordinance:

> To the extent that it pertained to *internal affairs*, the Ordinance of 1787 — notwithstanding its contractual form — was no more than a regulation of territory belonging to the United States, and was superceded by the admission of the State of Illinois into the Union "on an equal footing with the original states in all respects whatever." . . . *But*, so far as it established *public rights of highway in navigable waters* capable of bearing commerce from state to state, it did not regulate internal affairs alone, and was no more capable of repeal by one of the states than any other regulations of interstate commerce enacted by the Congress; being analogous in this respect to legislation enacted under the exclusive power of Congress to regulate commerce with the Indian tribes. 256 U.S. at 120. (Emphasis added.)

Thus, under *Economy Light*, although the act of Congress in admitting a state is sufficient to repeal the provisions of the Northwest Ordinance pertaining to the states' *internal affairs*, where interstate commerce is involved, the Northwest Ordinance remains in full force to preempt certain state actions,

such as taxation based on navigation of waterways serving interstate commerce.

The provisions of the Northwest Ordinance that governed the internal affairs of the territory where superseded by admission to statehood when the territory finally was divided into separate states. It is equally clear, however, as stated by Justice Pitney in *Economy Light*, that those provisions of the ordinance that "established public rights of highway in navigable waters capable of bearing commerce from state to state were not superseded by statehood and retained the status and effect of regulations of interstate commerce enacted by the Congress." It is not clear why the West Virginia court did not recognize the full impact of the United States Supreme Court's decision in *Ecomony Light*, but a careful reading of that decision leaves no doubt about the Court's distinction between matters peculiarly within the jurisdiction of the states and those, such as interstate commerce, that are within the exclusive power of Congress. The former are not burdened by enactments affecting territories prior to statehood, but the latter are preserved following statehood unless changed by action of the Congress.

For the foregoing reasons, the provisions contained in the Northwest Ordinance and the Virginia Compact declaring the status of navigable waterways such as the Ohio River as common highways, forever free, remain valid and effective today. The effect of the West Virginia fuel use tax is to impose a toll or charge for the navigation of the free highways of commerce maintained by the federal government. The tax is a direct intrusion into an area over which congress has exclusive jurisdiction and is, therefore, invalid.

CONCLUSION

For the foregoing reasons this Court should note probable jurisdiction of this Appeal so that the substantial federal question raised can be given plenary consideration.

Respectfully Submitted,

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APPENDICES

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APPENDIX A

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

No. _____

WATERWAYS ASSOCIATION OF PITTSBURGH,
Plaintiffs Below, Appellants,

v.

HERSCHEL ROSE, III, STATE TAX COMMISSIONER OF WEST VIRGINIA
Defendants Below, Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Waterways Association of Pittsburgh, the appellant named above, hereby appeals to the Supreme Court of the United States from the final order of the Circuit Court of Kanawha County, West Virginia, entered in this proceeding on April 18, 1986.

A copy of this Notice will also be filed in the Supreme Court of Appeals of West Virginia, inasmuch as the record may remain with this court.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ BURGESS L. DOAN
WALKER, CHATFIELD & DOAN
1900 Carew Tower
Cincinnati, Ohio 45202
(513) 621-1506
Counsel for Appellants

Filed with the Clerk of the Circuit Court of Kanawha County, West Virginia and with the Clerk of the Supreme Court of Appeals of West Virginia on April 28, 1987.

AFFIDAVIT OF SERVICE

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, TO-WIT:

I hereby affirm and certify that service of the foregoing Notice of Appeal to the Supreme Court of the United States was made on the parties required to be served by hand-delivering a true copy thereof to Appellees' attorney, Jeffrey V. Van Gilder, Assistant Attorney General, to him at the Attorney General's Office, State Capitol, Room W-435, Charleston, West Virginia 25305, and to Cathy S. Gatson, Clerk of Circuit Court of Kanawha County, West Virginia, Kanawha County Judicial Annex, Virginia Street East, Charleston, West Virginia 25301, this 28th day of April, 1987.

/s/ G. THOMAS BATTLE

Taken, subscribed and sworn to before me a Notary Public in said county and state, this 28th day of April, 1987.

My Commission expires August 13, 1994.

/s/ LINDA J. ROSS
Notary Public, State of West Virginia

[NOTARY SEAL]

APPENDIX B

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County on the 3rd day of February, 1987, the following order was made and entered, to-wit:

Waterways Association of Pittsburgh, a Pennsylvania corporation

vs.

Herschel H. Rose, III, Tax Commissioner of West Virginia

On a former day, to-wit, December 19, 1986, came the petitioner, Waterways Association of Pittsburgh, by Spilman, Thomas, Battle & Klostermeyer, G. Thomas Battle, and David B. Thomas, its attorneys, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Kanawha County rendered on the 18th day of April, 1986, with the record therein accompanying the petition, which being seen and inspected by the Court the appeal prayed for is refused. Justices McHugh and Brotherton would grant.

A True Copy

Attest: /s/ ANCIL H. RAMEY
Clerk, Supreme Court of Appeals

APPENDIX C

CIVIL ACTION NO. 84-C-2814

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

WATERWAYS ASSOCIATION OF PITTSBURGH, a Pennsylvania Corporation,

Plaintiff,

v.

HERSCHEL H. ROSE III, Tax Commissioner of the State of West Virginia,

Defendant.

OPINION AND FINAL ORDER

(Filed April 18, 1986)

Plaintiff, Waterways Association of Pittsburgh, brought this action pursuant to the provisions of W. Va. Code § 55-13-1 *et. seq.*, and Rule 57 of the West Virginia Rules of Civil Procedure. Plaintiff asks this Court to declare the provisions of House Bill 1657, which amended Articles 15 and 15A of Chapter 11 of the West Virginia Code, to violate certain provisions of the Northwest Ordinance and the Virginia Compact, the West Virginia Constitution and the United States Constitution.

FACTS

The facts herein, as stipulated by the parties, are as follows:

1. Plaintiff is Waterways Association of Pittsburgh, a nonprofit membership association incorporated under the laws of the State of Pennsylvania.

2. Defendant, Herschel H. Rose III ("Rose" or "State

Tax Commissioner"), is the Tax Commissioner of the State of West Virginia, having been duly appointed to such office as required by the Constitution and laws of the State of West Virginia.

3. On February 18, 1983, the West Virginia Legislature passed House Bill 1657, amending Articles 15 and 15A of Chapter 11 of the West Virginia Code (hereinafter sometimes referred to as "House Bill 1657"). House Bill 1657 became effective April 1, 1983, and provides for imposition of a tax on the sale, use or consumption in West Virginia of gasoline or special fuel. (The parties stipulated that House Bill 1657 amended Articles 14 and 14A of Chapter 11 of the West Virginia Code, but no such amendments to Articles 14 and 14A could be found by this Court.)

4. West Virginia Code § 11-15A-13(a)(2) imposes an excise tax on the "use or consumption in this State of gasoline or special fuel purchased outside this State at the rate of 5% of the average wholesale price of such gasoline or special fuel," with a minimum price for purposes of computation of the tax fixed by the statute at 97 cents per gallon.

5. West Virginia Code § 11-15A-13(c)(1) delegates to the State Tax Commissioner the authority to "determine the average wholesale price of gasoline and special fuel for each annual period, on the basis of sales data gathered for the preceding period of the first day of July through the thirty-first day of October."

6. The average wholesale price of gasoline and special fuel determined by the State Tax Commissioner on the basis of sales data gathered for the period of July 1, 1984, through October 31, 1984, was below the minimum price of 97 cents per gallon prescribed by W. Va. Code § 11-15A-13(c).

7. West Virginia Code § 11-15-13(c)(2) provides that the "average wholesale price" shall mean the statewide average per gallon wholesale price "as determined by the Tax Commissioner from information furnished by distributors of gasoline and special fuel in this State or such other information regarding wholesale prices as the Tax Commissioner may gather, or a combination of such information . . . ."

8. West Virginia Code § 11-15A-13(d) states:

> (d) *Computation of Tax Due from Motor Carriers.* — Every person who operates or causes to be operated a motor carrier in this State shall pay the tax imposed by this section on the average wholesale price of all gallons of gasoline or special fuel used in the operation of any motor carrier within this State, under the following rules:
>
> (1) The total amount of gasoline or special fuel used in the operation of the motor carrier within this State shall be that proportion of the total amount of gasoline and special fuel used in any motor carrier's operations within and without this State, that the total number of miles traveled within this State bears to the total number of miles traveled within and without this State.
>
> (2) A motor carrier shall first determine the gross amount of tax due under this section on the average wholesale value, determined under subsection (c), of all gasoline and special fuel used in the operation of the motor carrier within this State during the preceding quarter, as if all gasoline and special fuel had been purchased outside this State.
>
> (3) Next, the taxpayer shall determine the total tax paid under article fifteen of this chapter on all gasoline and special fuel purchased in this State for use in the operation of the motor carrier.
>
> (4) The difference between (2) and (3) is the amount of tax due under this article when (2) is greater than (3), or the amount to be refunded or credited to the motor carrier when (3) is greater than (2), which refund or credit shall be allowed in the same manner and under the same conditions as a refund or credit is allowed for the tax imposed by article fourteen-A of this chapter.

9. West Virginia Code § 11-15-18(c)(6) defines "motor carrier" to include "any aircraft, barge or other watercraft or locomotive transporting passengers or freight in or through this State."

10. Some of plaintiff's members are motor carriers within the meaning of West Virginia Code § 11-15-18(c)(6) and are in the business of transporting products by barge and other watercraft in interstate commerce on those parts of the Ohio River that are in the State of West Virginia, on other navigable rivers of the State, and on the Ohio River and other navigable rivers outside West Virginia.

11. Plaintiff's members that transport products by barge on the navigable rivers of West Virginia conduct one-point traffic, two-point traffic and/or pass-through traffic in West Virginia.

12. The following terms have the meaning specified for each:

a. One-point traffic — transporting goods from a point in West Virginia to a point in another state or transporting goods from another state to a point in West Virginia.

b. Two-point traffic — transporting goods from a point in West Virginia to another point in West Virginia.

c. Pass-through traffic — transporting goods from a point outside West Virginia, through West Virginia waters, to another point outside West Virginia.

d. West Virginia waters — navigable waterways within the boundaries of West Virginia.

e. West Virginia mileage — distance traveled by barge in navigable waters within the boundaries of West Virginia.

f. System mileage — distance traveled by barge in navigable waters both within and without the boundaries of West Virginia.

13. Some of plaintiff's members have only pass-through traffic and one-point traffic in West Virginia and have no two-point traffic in West Virginia.

14. Some of plaintiff's members have pass-through traffick, one-point traffic and two-point traffic in West Virginia.

15. Some of plaintiff's members have as much as 70% of their West Virginia mileage as pass-through traffic.

16. Some of plaintiff's members have 100% of their West Virginia mileage on the Ohio River.

17. Some of plaintiff's members have West Virginia mileage on the Ohio, Kanawha, Big Sandy and Monongahela Rivers.

18. The United States Government has sole responsibility for the regulation, servicing and maintenance of the navigable waterways, of which the Ohio, Kanawha, Big Sandy and Monongahela Rivers are a part. Article 1, Section 8 and Article 3, Section 2, Constitution of the United States; Title 33 U.S.C. § 1; Title 49 U.S.C. § 1 *et. seq.*

19. The sole means of power for navigation for barge transportation performed by plaintiff's members in West Virginia waters is gasoline or special fuel as defined in W. Va. Code § 11-15-18(9).

20. The amount of fuel used and consumed by boats operating barge traffic in West Virginia Waters increases as the size and weight of the boat increases.

21. The State Tax Commissioner requires the tax imposed by W. Va. Code § 11-15A-13(a) to be paid with respect to all gasoline and special fuel used and consumed by barge transportation operating in West Virginia waters.

22. The boundary of West Virginia along the Ohio River was established as the low water mark of the river on the west bank in 1787 by the Northwest Ordinance.

23. The establishment of locks and dams on the Ohio River system has caused the low water mark on the west bank of the river to rise and consequently at certain locations on the Ohio River along the West Virginia boundary, barge transportation may navigate west of the original low water mark in Ohio waters.

24. Certain of plaintiff's members operating in West Virginia have filed returns required under the provisions of House Bill 1657 and paid tax on fuel purchased outside West Virginia and used in their river transportation business in West Virginia. Other of the plaintiff's members do not engage in river transportation business in West Virginia, and have not paid tax under the provisions of House Bill 1657.

25. The State Tax Commissioner is empowered by House Bill 1657 and by the provisions of Chapter 11 of the West Virginia Code to administer and enforce the tax imposed by said legislation.

26. None of the plaintiff's members has ever sought to apply any credit as may be available under the provisions of Code 11-10A-8(a) against the tax imposed by W. Va. Code § 11-15A-13.

27. As a result of House Bill 1657 codified as W. Va. Code § 11-15A-13(a)(2), the State collects from watercraft approximately $250,000.00 per quarter year for a total of approximately one million dollars per year. Collections from railroad carriers total approximately 2 million dollars per year. Collections from motor trucks total approximately 6 million dollars per year.

I.

Plaintiff's first argument is that W. Va. Code § 11-15A-13, as applied to its members, violates the Northwest Ordinance of 1787, reenacted after ratification of the United States Constitution on August 7, 1789. Chap. 8, 1 Stat. at L. 50. The Northwest Ordinance provides, in part:

> (T)he navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost or duty therefore.

The Virginia Compact, Va. Rev. Code 1819, p. 59 provided, in part:

> (T)hat the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this Commonwealth lies thereon, shall be free and common to the

> citizens of the United States, and the respective jurisdictions of this Commonwealth and of the proposed state on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river.

Plaintiff argues that the language regarding the freedom of the subject navigable waters prevents West Virginia from collecting use tax on gasoline or special fuel consumed on rivers within the boundaries of West Virginia.

In *American Barge Line Co.* v. *Koontz*, 136 W. Va. 747, 68 S.E.2d 56 (1951), the West Virginia Supreme Court held that the Northwest Ordinance and Virginia Compact did not limit the sovereignty of West Virginia. The Court, citing *Economy Light & Power Co.* v. *United States*, 256 U.S. 113, 41 S.Ct. 409, 69 L. Ed 847 (1920), found that the power of the state is plenary unless and until Congress intervenes. Plaintiff argues that the West Virginia Supreme Court misinterpreted *Economy Light*. We disagree. We find that the use tax statute, as applied to Plaintiff's members, does not violate the Northwest Ordinance or the Virginia Compact. *See Streckfus Steamers* v. *Fox*, 14 F. Supp 312 (S.D. W. Va. 1936).

II.

Plaintiff's second argument is that W. Va. Code § 11-15A-13(c) constitute an unlawful delegation of power by the Legislature in violation of Article V, Section 1 of the Constitution of West Virginia to the Tax Commissioner, W. Va. Code § 11-15A-3(c) provides:

(c) Determination of average wholesale price.

(1) To simplify determining the average wholesale price of all gasoline and special fuels, the Tax Commissioner shall . . . determine the average wholesale price of gasoline and special fuel for each annual period, . . .

(2) The "average wholesale price" shall mean the single, state-wide average per gallon wholesale price, . . . as deter-

mined by the Tax Commissioner from information furnished by distributors of gasoline or special fuel in this State, or such other information regarding wholesale selling prices as the Tax Commissioner may gather, or a combination of such information: Provided, that in no event shall the average wholesale price be determined to be less than ninety-seven cents per gallon of gasoline or special fuel.

Plaintiff contends that Section 11-15A-13(c) does not provide adequate standards for the Tax Commissioner to determine the average wholesale price of gasoline or special fuel.

We are of the opinion that this section does not constitute an unlawful delegation of legislative power. The State Tax Commissioner is authorized to determine the average wholesale price of gasoline or special fuel. This is merely a factual determination: The total wholesale price paid for gasoline or special fuel divided by the total number of gallons sold equals the average wholesale price. This determination is a mathematical computation, a mere ministerial function.

If the Tax Commissioner had the authority to determine the total revenue to be raised by this tax or if he could set the rate of taxation, then the statute would constitute an unlawful delegation of the Legislature's authority. However, the tax rate is predetermined. W. Va. Code § 11-15A-2. Total revenue is determined by applying the rate to a value, which value is determined by a reasonable method of computation. This determination has limits, which do not make it an unlawful delegation of legislative power.

III.

Plaintiff contends that the use tax on gasoline and special fuel consumed in West Virginia, insofar as it pertains to its members, constitutes a "duty of tonnage" laid without consent of Congress, in violation of Article I, Section 10, Clause 3 of the United States Constitution. With reference to this clause of the Constitution, it has been stated:

(T)hat prohibition forbids a tax "upon the privilege of

> access by vessels or goods to the ports or territorial limits of a state," and applies to taxes and duties "which operate to impose a charge for the privilege of entering trading in, or lying in a port." (cites omitted) This is not that sort of tax.

Commonwealth v. *Baltimore Steam Packet Co.*, 193 Va. SS, ____, 68 S.E.2d 137, 140 (1951).

Commonwealth involved a Virginia license tax "for the privilege of doing business" which was based upon gross receipts. Va. Code § 58-575 (1950). If a tax on the privilege of doing business solely on the navigable waters of the State is not a duty of tonnage, then we are of the opinion that an excise tax on the use or consumption of personal property is not a duty of tonnage. *See also Union Barge Line* v. *Hardesty*, 282 S.E.2d 240 (1981); *American Barge Line* v. *Koontz*, 136 W. Va. 757, 68 S.E.2d 56 (1951); *American Barge Line* v. *Marcum*, 360 S.W.2d 134 (Ky. 1962).

Furthermore, the taxes exacted by the challenged statute are exactions which help defray the cost of services provided by the State, such as police and fire protection. *Union Barge Line, supra; Japan Line Ltd.* v. *County of Los Angeles*, 141 Cal. Rptr. 905, 571 P.2d 254 (1977); rather than charges for access to the navigable waters of the State.

Also persuasive is the fact that this tax applies to all "motor carriers" as defined in W. Va. Code § 11-15A-13(b), which incorporates the definition set forth in Section 11-15-18. This definition includes locomotives, aircraft and a variety of motor vehicles. It is apparent that these vehicles do not pay duties of tonnage.

Defendant also points out that the tax applies only to watercraft using gasoline or special fuel. Watercraft propelled by other means do not pay this tax. Were this tax a duty of tonnage, we believe it would apply to all watercraft having access to the navigable waters of the State, regardless of their means of propulsion.

IV.

Plaintiff's last contention is that the challenged statute violates Article 1, Section 8, Clause 3 of the Constitution of the United States, known as the Commerce Clause. More specifically, Plaintiff contends that these taxes do not comply with three of the four prongs of the test of *Complete Auto Transit Inc.* v. *Brady* 430 US 274 (1977).

Plaintiff contends that its members do not have substantial nexus with the State of West Virginia and that the tax is not fairly related to the services provided by the States. In *Union Barge Line* v. *Hardesty, supra,* involving a taxpayer engaged in essentially the same business as Plaintiff's members, the West Virginia found substantial nexus and benefits fairly related to the tax. *Union Barge Line* is controlling precedent.

Plaintiff also contends that the use tax discriminates against interstate commerce, because it allows a credit for sales tax paid in West Virginia, but doesn't allow a credit for sales tax paid to another State.

West Virginia Code § 11-10A-8 (repealed July 1, 1985) provides, in part:

> (a) *Use Tax Credit.* —
>
> Each purchaser liable for a use tax on tangible personal property shall be entitled to full credit for the combined amount or amounts of legally imposed sales or use taxes paid by him with respect to the same property to another state and any subdivision thereof. The credit shall be applied first against the amount of any use tax due the state, . . .

Thus, between the effective date of House Bill 1657 and the date of the repeal of W. Va. Code § 11-10A-8, Plaintiff's argument is totally without basis.

After July 1, 1985, there is no credit available to Plaintiff's members, or other motor carriers, who purchase gasoline or special fuel in another State, pay sales tax thereon, and then use the same gasoline or special fuel in West Virginia. Without such a credit, motor carriers are discriminated

against *solely* because they purchase gasoline or special fuel *in another State*. This discriminates against interstate commerce and, therefore, violates the Commerce Clause as interpreted by the United States Supreme Court in *Complete Auto Transit, supra.*

Assuming that a motor carrier purchases special fuel in West Virginia, it pays a 5% sales tax. If it uses the fuel in West Virginia, it pays no additional tax. The same carrier could purchase fuel in another state and pay a 5% sales tax. If the carrier uses the same fuel in West Virginia, it pays a 5% use tax. Because the carrier purchases fuel in another state to use in West Virginia, it shoulders a higher tax burden. This favors West Virginia commerce over interstate commerce.

Both parties cite *Henneford* v. *Silas Mason Co.*, 300 US 577, 81 L.Ed. 814, (1936), in support of their positions. Defendant cites language which indicates that a credit for taxes paid to another state is not a prerequisite to the validity of a use tax. The Court explicitly declined to decide the issue. *Id.*, at 587, 81 L.Ed. at 821.

We believe the Court's later analysis of *Silas Mason* represents the actual spirit of the discrimination test. *Halliburton Oil Well Cementing Co.*, 373 U.S. 64, 10 L.Ed.2d 202 (1963). There the Court stated:

> "Equality is the theme that runs through all the sections of the statute. . . . No one who uses property in Washington after buying it at retail is to be exempt from a tax upon the privilege of enjoyment except to the extent that he has paid a use or sales tax somewhere." The use tax is "upon one activity or incident," and the sales tax is "upon another, but the sum is the same when the reckoning is closed." . . . 300 U.S., at 583, 584.

The conclusion is inescapable: equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state.

The inequality of the Louisiana tax burden between in-state and out-of-state manufacturer-users is admitted. Although the rate is the same, the appellant's tax base is increased through the inclusion of its product's labor and shop overhead. The Louisiana Supreme Court characterized this discrepancy as incidental. However, equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions. (footnote omitted) *Id.* at 70, 10 L.Ed.2d at 207. As in *Halliburton*, we are confronted with a situation where the rate of taxation is equal, but the tax burden on those engaged in interstate commerce is different when measured in dollars and cents. As in *Halliburton*, we find the tax to be discriminatory under the Commerce Clause.

FINAL ORDER

In accordance with the opinion rendered in this case, this Court does hereby DECLARE:

1. That West Virginia Code § 11-15-18 is constitutional and valid in every respect; that it is not violative of the Northwest Ordinance; that it is not an unlawful delegation of legislative authority under Article V, Section I of the Constitution of West Virginia; that it is not a duty of tonnage, pursuant to Article I, Section 10, Clause 3 of the United States Constitution; and that it does not violate the Commerce Clause, Article I, Section 8, Clause 3 of the Constitution of the United States.

2. West Virginia Code § 11-15A-13 is constitutional and valid in every respect between the date of its enactment and June 30, 1985, inclusive the last day that W. Va. Code § 11-10A-1 *et seq.* was in effect, for the same reasons that W. Va. Code § 11-15-18 is constitutional and valid.

3. West Virginia Code § 11-15A-13 is unconstitutional and without effect after June 30, 1985, as it discriminates against interstate commerce and, therefore, violates Article I, Section 8, Clause 3 of the United States Constitution.

This Court does hereby ORDER and ADJUDGE:

1. That no remedy is available to Plaintiff for the period April 1, 1983, through June 30, 1985, inclusive.

2. That Defendant shall refund to Plaintiff's members all use taxes collected after July 1, 1985, pursuant to West Virginia Code § 11-15A-13.

3. That Defendant shall refrain from collecting or attempting to collect any use taxes which might otherwise be due and owing under W. Va. Code § 11-15A-13.

The Court does hereby FURTHER ORDER that a certified copy of this Final Order be sent to all parties or counsel of record. The Court notes the objection and exception of the party or parties aggrieved by this Final Order.

ENTER: /s/ JUDGE MARGARET L. WORKMAN

DATE: April 18, 1986

APPENDIX D

CONSTITUTION AND STATUTES

A. *United States Constitution and Code:*

1. Article I, Section 8, Clause 3 (the Commerce Clause)

The Congress shall have Power . . . to regulate Commerce with Foreign Nations, and among the several States and with the Indian Tribes;

2. Article I, Section 10, Clause 3 (the Duty of Tonnage Clause)

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

3. Article VI, Clause 2 (the Supremacy Clause)

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

4. Amendment XIV, Section 1, Clause 4

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5. U.S. Code

a. 26 U.S.C.

§ 4042. Tax on fuel used in commercial transportation on inland waterways [effective 10/1/80].

(a) In general. There is hereby imposed a tax on any liquid used during any calendar quarter by any person as a fuel in a vessel in commercial waterway transportation.

(b) Amount of tax. The tax imposed by subsection (a) shall be determined from the following table:

If the use occurs—	The tax is—
After September 30, 1980 and before October 1, 1981	4 cents a gallon
After September 30, 1981 and before October 1, 1983	6 cents a gallon
After September 30, 1983 and before October 1, 1985	8 cents a gallon
After September 30, 1985	10 cents a gallon

(c) Exemptions.

(1) Deep-draft ocean-going vessels. The tax imposed by subsection (a) shall not apply with respect to any vessel designed primarily for use on the high seas which has a draft of more than 12 feet.

(2) Passenger vessels. The tax imposed by subsection (a) shall not apply with respect to any vessel used primarily for the transportation of persons.

(3) Use by state or local government in transporting property in a state or local business. Subparagraph (B) of subsection (d)(1) shall not apply with respect to use by a State or political subdivision thereof.

(4) Use in moving lash and seabee ocean-going barges. The tax imposed by subsection (a) shall not apply with respect

to use for movement by tug of exclusively LASH (Lighter-aboard-ship) and SEABEE ocean-going barges released by their ocean-going carriers solely to pick up or deliver international cargoes.

(d) Definitions. For purposes of this section—

(1) Commercial waterway transportation. The term "commercial waterway transportation" means any use of a vessel on any inland or intracoastal waterway of the United States—

(A) in the business of transporting property for compensation or hire, or

(B) in transporting property in the business of the owner, lessee, or operator of the vessel (other than fish or other aquatic animal life caught on the voyage).

(2) Inland or intracoastal waterway of the United States. The term "inland or intracoastal waterway of the United States" means any inland or intracoastal waterway of the United States which is described in section 206 of the Inland Waterways Revenue Act of 1978 [33 USCS § 1804].

(3) Person. The term "person" includes the United States, a State, a political subdivision of a State, or any agency or instrumentality of any of the foregoing.

(e) Date for filing return. The date for filing the return of the tax imposed by this section for any calendar quarter shall be the last day of the first month following such quarter.

(Added Oct. 21, 1978, P.L. 95-502, Title II, § 202(a), 92 Stat. 1696.)

b. 28 USC

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validy.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section the term "highest court of a State" includes the District of Columbia Court of Appeals.

(June 25, 1948, c. 646, § 1, 62 Stat. 929; July 29, 1970, P.L. 91-358, Title I, Part D, Subpart 2, § 172(a)(1), 84 Stat. 590.)

c. 33 U.S.C.

§ 1801. Establishment of Inland Waterways Trust Fund

(a) Creation of trust fund. There is established in the treasury of the United States a trust fund to be known as the "Inland Waterways Trust Fund" (hereinafter in this title referred to as the "Trust Fund"), consisting of such amounts as may be appropriated or credited to the Trust Fund as provided in this section.

(b) Transfer to trust of amounts equivalent to certain taxes.
(1) In general. There are hereby appropriated to the Trust Fund amounts determined by the Secretary of the Treasury (hereinafter in this sectio referred to as the "Secretary") to be equivalent to the amounts of the taxes received in the Treasury under section 4042 of the Internal Revenue Code

of 1954 [26 USCS § 4042] (relating to tax on fuel used in commercial transportation on inland waterways).

(2) Method of transfer. The amounts appropriated by paragraph (1) shall be transferred at least quarterly from the general fund of the Treasury to the Trust Fund on the basis of estimates made by the Secretary of the amounts referred to in paragraph (1) received in the Treasury. Proper adjustments shall be made in the amounts subsequently transferred to the extent prior estimates were in excess of or less than the amounts required to be transferred.

(c) **Management of trust fund.** (1) Report. It shall be the duty of the Secretary to hold the Trust Fund, and to report to the Congress each year ending on or after September 30, 1981, on the financial condition and the results of the operations of the Trust Fund during the preceding fiscal year and on its expected condition and operations during the fiscal year and the next 5 fiscal years after the fiscal year. Such report shall be printed as a house document of the session of the Congress to which the report is made.

(2) Investment. (A) In general. It shall be the duty of the Secretary to invest such portion of the Trust Fund as is not, in his judgment, required to meet current withdrawals. Such investments may be made only in interest-bearing obligations of the United States. For such purpose, such obligations may be acquired (i) on original issue at the issue price, or (ii) by purchase of outstanding obligations at the market price.

(B) Sale of obligations. Any obligation acquired by the Trust Fund may be sold by the Secretary at the market price.

(C) Interest; proceeds from sales and redemptions. The interest on, and the proceeds from the sale or redemption of, any obligations held in the Trust Fund shall be credited to and from a part of the Trust Fund.

(Oct. 21, 1978, P. L. 95-502, Title II, § 203, 92 Stat. 1697.)

§ 1802. Trust Fund available for expenditures for navigation construction and rehabilitation projects on inland waterways

(a) In general. Amounts in the Trust Fund shall be available, as provided by appropriations Acts, for making construction and rehabilitation expenditures for navigation on the inland and intracoastal waterways of the United States described in section 206 of this Act [33 USCS § 1804]. No amount may be appropriated out of the Trust Fund unless the law authorizing the expenditure for which the amount is appropriated explicitly provides that the appropriation is to be made out of the Trust Fund.

(b) Expenditures must be otherwise authorized by law. Nothing in this section shall be deemed to authorize any program, project, or other activity not otherwise authorized by law.

(Oct. 21, 1978, P. L. 95-502, Title II, § 204, 92 Stat. 1698.)

§ 1803. Study with respect to inland waterway user taxes and charges

(a) Study directed. The Secretary of Transportation and the Secretary of Commerce, in consultation with the Secretary of the Treasury, the Secretary of Agriculture, the Secretary of Energy, the Attorney General of the United States, the Secretary of the Army, the Chairman of the Water Resources Council, and the Director of the Office of Management and Budget, shall—

(1) make a full and complete study with respect to inland waterway user taxes and charges, and

(2) make findings and policy recommendations with respect thereto.

Such study shall include (but shall not be limited to) a consideration of the matters listed in subsections (b), (c), (d), (e), and (f) of this section.

(b) Considerations relating to the taxing mechanism. (1) The extent to which the Federal Government should seek to recover some or all of Federal expenditures for the benefit of inland waterway transportation from the users of the facilities for which such expenditures are made.

(2) The various forms of inland waterway user taxes and charges which could be established.

(3) The various methods of collecting inland waterway user taxes and charges, and the administrative costs of such taxes and charges.

(4) The classes and categories of users and other persons on whom inland waterway user taxes and charges should be imposed.

(5) The waterways of the United States (including the Great Lakes, deep draft channels, and coastal ports) which should be included in any system of user taxes and charges, together with the economic effects of such taxes and charges.

(6) The use of revenues derived from inland waterway user taxes and charges, including consideration of changes in, or alternatives to, the Trust Fund mechanism.

(c) Considerations relating to economic effects. The economic effects of waterway user taxes and charges on—

(1) Carriers and users. On—

(A) carriers and shippers using the inland waterways, and

(B) users (including ultimate consumers) of commodities which are transported on the inland waterways.

(2) Regions, etc. On—

(A) existing investment in industrial plants, agricultural interests, and commercial enterprises, and on related

employment, in regions of the country served by inland water transportation directly or in combination with other modes, and

(B) future economic growth prospects in such regions, including anticipated shifts of industry and employment to other areas together with an evaluation of effects on regional economies and their development, including consistency with Federal policies as set forth in other legislation.

(3) Small business and industrial concentration and competition. On—

(A) small business enterprise, and

(B) industrial concentration and competition, both within the transportation industry and in any line of commerce (within the meaning of the antitrust laws).

(4) Competitors. On the freight rates charged by other modes of transportation and the extent of short-term and long-term diversion of traffic from the inland waterways to such other modes. In considering such diversion of traffic, there shall also be considered the effects of such diversion on—

(A) the development of alternative sources of supply and on alternative modes of transportation and alternative routing to market,

(B) the comparative safety of the handling and transportation of hazardous materials, and

(C) the comparative energy efficiency of the modes and routes of the transportation involved.

(5) Prices. On prices of commodities shipped by inland waterways and by competing modes, including the costs of energy materials and the effects on electric power rates.

(6) Balance of payments. On the balance of payments of the United States based on our international trade.

(d) Considerations relating to economic feasibility of waterway improvement projects; level of benefits from waterway expenditures. (1) The effects of inland waterway user taxes and charges on the economic feasibility of inland waterway improvement projects.

(2) The comparative levels of benefits received from Federal expenditures on inland waterways for—

(A) commercial uses, and

(B) other uses, including (but not limited to) recreation, reclamation, water supply, low-flow augmentation, fish and wildlife enhancement, hydroelectric power, flood control, and irrigation uses.

(e) Considerations relating to Federal assistance. (1) The extent of past, present, and expected future Federal assistance to the several modes of freight transportation. Such consideration shall include an evaluation and comparison of the public benefits resulting from such assistance to each of the several transportation modes in terms of adequacy, efficiency, and economy of service, safety, technological progress, and energy conservation. The Federal assistance considered under this paragraph shall include all forms of such assistance, such as tax advantages, direct grants, rate adjustments for improvement purposes, assumption of pension fund liabilities, loans, guarantees, capital participation, revenues from land grants, and provision of right-of-way operation, maintenance, and improvement.

(2) The competitive effects of past, present, and expected future Federal expenditures on inland waterways on competitive modes of transportation.

(3) The need for Federal assistance to agricultural, industrial, and other interests affected by inland waterway user taxes and charges.

(f) Considerations relating to policy and future development. The effects of inland waterway user taxes and charges on—

(1) The achievement of the objectives of the National Transportation Policy as set forth in the preamble to the Transportation Act of 1940.

(2) The expansion and improvement of the inland waterways determined to be necessary by the Secretary of the Army under section 158 of the Water Resources Development Act of 1976 (Public Law 94-587) [33 USCS § 540 note] or estimated to be necessary under paragraph (3).

(3) The requirements of the Nation through the year 2000 for transportation service, the portion thereof which should be provided by inland waterway carriers and an estimate of the expansion and improvement of inland waterways capacity necessary to meet such requirements.

(g) "Inland waterway user taxes and charges" defined. For purposes of this section, the term "inland waterway user taxes and charges" means taxes imposed on the use of the inland and intracoastal waterways of the United States and all alternatives to such taxes.

(h) Report. Not later than September 30, 1981, the Secretary of Transportation shall transmit to Congress a final report of the study required by this section, together with his findings and recommendations (including necessary legislation) and the findings and recommendations of the Secretary of Commerce, the Secretary of Treasury, the Secretary of Agriculture, the Secretary of Energy, the Attorney General of the United States, the Secretary of the Army, the Chairman of the Water Resources Council, and the Director of the Office of Management and Budget.

(i) Authorization of appropriations. There are hereby authorized to be appropriated from time to time to the Secretary of Transportation such sums, not to exceed

$8,000,000 in the aggregate, as may be necessary to carry out the study required by this section.

(Oct. 21, 1978, P. L. 95-502, Title II, § 205, 92 Stat. 1698.)

§ 1804. Inland and intracoastal waterways of the United States

For purposes of section 4042 of the Internal Revenue Code of 1954 [26 USCS § 4042] (relating to tax on fuel used in commercial transportation on inland waterways) and for purposes of section 204 of this Act [33 USCS § 1802], the following inland and intracoastal waterways of the United States are described in this section:

(1) Alabama-Coosa Rivers: From junction with the Tombigbee River at river mile (hereinafter referred to as RM) 0 to junction with Coosa River at RM 314.

(2) Allegheny River: From confluence with the Monongahela River to form the Ohio River at RM 0 to the head of the existing project at East Brady, Pennsylvania, RM 72.

(3) Apalachicola-Chattahoochee and Flint Rivers: Apalachicola River from mouth at Apalachicola Bay (intersection with the Gulf Intracoastal Waterway) RM 0 to junction with Chattachoochee [Chattahoochee] and Flint Rivers at RM 107.8. Chattachoochee [Chattahoochee] River from junction with Apalachicola and Flint Rivers at RM 0 to Columbus, Georgia, at RM 155 and Flint River, from junction with Apalachicola and Chattahoochee Rivers at RM 0 to Bainbridge, Georgia, at RM 28.

(4) Arkansas River (McClellan-Kerr Arkansas River Navigation System): From junction with Mississippi River at RM 0 to port of Catoosa, Oklahoma, at RM 448.2.

(5) Atchafalaya River: From RM 0 at its intersection with the Gulf Intracoastal Waterway at Morgan City, Louisiana, upstream to junction with Red River at RM 116.8.

(6) Atlantic Intracoastal Waterway: Two inland water routes approximately paralleling with Atlantic coast between Norfolk, Virginia, and Miami, Florida, for 1,192 miles via both Albermarle and Chesapeake Canal and Great Dismal Swamp Canal routes.

(7) Black Warrior-Tombigbee-Mobile Rivers: Black Warrior River System from RM 2.9, Mobile River (at Chickasaw Creek) to confluence with Tombigbee River at RM 45. Tombigbee River (to Demopolis at RM 215.4) to port of Birmingham, RM's 374-411 and upstream to head of navigation on Mulberry Fork (RM 429.6), Locust Fork (RM 407.8), and Sipsey Fork (RM 430.4).

(8) Columbia River (Columbia-Snake Rivers Inland Waterways): From The Dalles at RM 191.5 to Pasco, Washington (McNary Pool), at RM 330, Snake River from RM 0 at the mouth to RM 231.5 at Johnson Bar Landing, Idaho.

(9) Cumberland River: Junction with Ohio River at RM 0 to head of navigation, upstream to Carthage, Tennessee, at RM 313.5.

(10) Green and Barren Rivers: Green River from junction with the Ohio River at RM 0 to head of navigation at RM 149.1.

(11) Gulf Intracoastal Waterway: From St. Mark's River, Florida, to Brownsville, Texas, 1,134.5 miles.

(12) Illinois Waterway (Calumet-Sag Channel): From the junction of the Illinois River with the Mississippi River RM 0 to Chicago Harbor at Lake Michigan, approximately RM 350.

(13) Kanawha River: From junction with Ohio River at RM 0 to RM 90.6 at Deepwater, West Virginia.

(14) Kaskaskia River: From junction with the Mississippi River at RM 0 to RM 36.2 at Fayetteville, Illinois.

(15) Kentucky River: From junction with Ohio River at

RM 0 to confluence of Middle and North Forks at RM 258.6.

(16) Lower Mississippi River: From Baton Rouge, Louisiana, RM 233.9 to Cairo, Illinois, RM 953.8.

(17) Upper Mississippi River: From Cairo, Illinois, RM 953.8 to Minneapolis, Minnesota, RM 1,811.4.

(18) Missouri River: From junction with Mississippi River at RM 0 to Sioux City, Iowa, at RM 734.8.

(19) Monongahela River: From junction with Allegheny River to form the Ohio River at RM 0 to junction of the Tygart and West Fork Rivers, Fairmont, West Virginia, at RM 128.7.

(20) Ohio River: From junction with the Mississippi River at RM O to junction of the Allegheny and Monongahela Rivers at Pittsburgh, Pennsylvania, at RM 981.

(21) Ouachita-Black Rivers: From the mouth of the Black River at its junction with the Red River at RM 0 to RM 351 at Camden, Arkansas.

(22) Pearl River: From junction of West Pearl River with the Rigolets at RM 0 to Bogalusa, Louisiana, RM 58.

(23) Red River: From RM 0 to the mouth of the Cypress Bayou at RM 236.

(24) Tennessee River: From junction with Ohio River at RM 0 to confluence with Holstein and French Rivers at RM 652.

(25) White River: From RM 9.8 to RM 255 at Newport, Arkansas.

(26) Willamette River: From RM 21 upstream of Portland, Oregon, to Harrisburg, Oregon, at RM 194.

(Oct. 21, 1978, P. L. 95-502, Title II, § 206, 92 Stat. 1700.)

B. *The Northwest Ordinance of 1787*

ARTICLE IV

The said territory, and the States which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made; and to all the acts and ordinances of the United States in Congress assembled, conformable thereto. The inhabitants and settlers in the said territory shall be subject to pay a part of the Federal debts, contracted, or to be contracted, and a proportional part of the expenses of government to be apportioned on them by Congress, according to the same conmmon rule and measure by which apportionments thereof shall be made on the other States; and the taxes for appying their proportion shall be laid and levied by the authority and direction of the legislatures of the district, or districts, or new States, as in the original States, within the time agreed upon by the United States in Congress assembled. The legislatures of those districts, or new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the bonafide purchasers. No tax shall be imposed on lands the property of the United States; and in no case shall nonresident proprietors be taxed higher than residents. The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.

C. *The Virginia Compact of 1789*

SECT. 11. Seventh, that the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this Commonwealth lies thereon, shall be free and common to the

citizens of the United States, and the respective jurisdictions of this Commonwealth and of the proposed state on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river.

D. *West Virginia Code:*

a. § 11-15-13. Collection of tax when sale on credit.

A vendor doing business wholly or partially on a credit basis shall require the purchaser to pay the full amount of tax due upon a credit sale at the time such sale is made or within thirty days thereafter. (1937), c. 108; 1955, c. 169.)

b. § 11-15A-13. Tax on gasoline and special fuel.

(a) *Imposition of tax.*

(1) *On deliveries in this State.* — Gasoline or special fuel furnished or delivered within this State to consumers or users is subject to the tax rate imposed by section two [§ 11-15A-2] of this article: Provided, that the amount of tax due under section two shall in no event be less than five percent of the average wholesale price of gasoline, and with such price to, in no case, be deemed to be less than ninety-seven cents per gallon for all gallons of gasoline and special fuel taxable under section two [§ 11-15A-2] of this article.

(2) *On purchases out of State.* — An excise tax is hereby imposed on the use or consumption in this State of gasoline or special fuel purchased outside this State at the rate of five percent of the average wholesale price of such gasoline or special fuel, as determined under subsection (c), notwithstanding any provision of this article to the contrary: Provided, that gasoline or special fuel contained in the supply tank of a motor vehicle that is not a motor carrier shall not be taxable, except that gasoline or special fuel imported in the supply tank or auxiliary tank of construction equipment, mining equipment, track maintenance equipment or other similar equipment, shall be taxed in the same manner as that in the supply tank of a motor carrier.

(b) *Definitions.* — Terms used in the section shall have the same meaning as when used in a comparable context in section eighteen [§ 11-15-18], article fifteen of this chapter.

(c) *Determination of average wholesale price.*

(1) To simplify determining the average wholesale price of all gasoline and special fuel, the tax commissioner shall, effective with the period beginning the first day of the month of the effective date of this section [April 1, 1983] and each first day of January, annually, thereafter, determine the average wholesale price of gasoline and special fuel for each annual period, on the basis of sales data gathered for the preceding period of the first day of July through the thirty-first day of October. Notification of the average wholesale price of gasoline and special fuel shall be given by the tax commissioner at least thirty days in advance of each first day of January, annual period, by filing notice of the average wholesale price in the state register, and by such other means as the tax commissioner deems reasonable: Provided, that notice of the average wholesale price of gasoline and special fuel for the first period shall be timely given if filed in the state register on the effective date of this section [April 1, 1983].

(2) The "average wholesale price" shall mean the single, state-wide average per gallon wholesale price, rounded to the third decimal (thousandth of a cent), exclusive of state and federal excise taxes on each gallon of gasoline or diesel fuel, as determined by the tax commissioner from information furnished by distributors of gasoline or special fuel in this State, or such other information regarding wholesale selling prices as the tax commissioner may gather, or a combination of such information: Provided, that in no event shall the average wholesale price be determined to be less than ninety-seven cents per gallon of gasoline or special fuel.

(3) All actions of the tax commissioner in acquiring data necessary to establish and determine the average wholesale price of gasoline and special fuel, in providing notification of

his determination prior to the effective date of any change in rate, and in establishing and determining the average wholesale price of fuel, may be made by the tax commissioner without compliance with the provisions of article three [§ 29A-3-1 et seq.], chapter twenty-nine-A of this Code.

(4) In any administrative or court proceeding brought to challenge the average wholesale price of gasoline and special fuel as determined by the tax commissioner, his determination shall be presumed to be correct and shall not be set aside unless it is clearly erroneous.

(d) *Computation of tax due from motor carriers.* — Every person who operates or causes to be operated a motor carrier in this State shall pay the tax imposed by this section on the average wholesale price of all gallons of gasoline or special fuel used in the operation of any motor carrier within this State, under the following rules:

(1) The total amount of gasoline or special fuel used in the operation of the motor carrier within this State shall be that proportion of the total amount of gasoline and special fuel used in any motor carrier's operations within and without this State, that the total number of miles traveled within this State bears to the total number of miles traveled within and without this State.

(2) A motor carrier shall first determine the gross amount of tax due under this section on the average wholesale value, determined under subsection (c), of all gasoline and special fuel used in the operation of the motor carrier within this State during the preceding quarter, as if all gasoline and special fuel had been purchased outside this State.

(3) Next, the taxpayer shall determine the total tax paid under article fifteen [§ 11-15-1 et seq.] of this chapter on all gasoline and special fuel purchased in this State for use in the operation of the motor carrier.

(4) The difference between (2) and (3) is the amount of tax due under this article when (2) is greater than (3), or the

amount to be refunded or credited to the motor carrier when (3) is greater than (2), which refund or credit shall be allowed in the same manner and under the same conditions as a refund or credit is allowed for the tax imposed by article fourteen-A [§ 11-14A-1 et seq.] of this chapter.

(e) *Return and payment of tax.* — Tax due under this article on the use or consumption in this State of gasoline or special fuel shall be paid by each taxpayer on or before the twenty-fifth day of January, April, July and October of each year, notwithstanding any provision of this article to the contrary, by check, bank draft, certified check or money order, payable to the tax commissioner, for the amount of tax due for the preceding quarter. Every taxpayer shall make and filed with his remittance, a return showing such information as the tax commissioner may require.

(f) *Compliance.* — To facilitate ease of administration and compliance by taxpayers, the tax commissioner may require motor carriers liable for the taxes imposed by this article on the use of gasoline or special fuel in the operation of motor carriers within this State, and the tax imposed by article fourteen-A [§ 11-14A-1 et seq.] of this chapter on such gallons of fuel, to file a combined return and make a combined payment of the tax due under this article and article fourteen-A [§ 11-14A-1 et seq.] of this chapter on such fuel. In order to encourage use of a combined return and the making of a single payment each quarter for both taxes, the due date of the return and tax due under article fourteen-A [§ 11-14A-1 et seq.] of this chapter is hereby changed from the last day of January, April, July and October of each calendar year, to the twenty-fifth day of such months, notwithstanding any provision in article fourteen-A [§ 11-14A-1 et seq.] of this chapter to the contrary.

(g) *Dedication of tax to highways.* — All tax collected under the provisions of this section after deducting the amount of any refunds lawfully paid shall be deposited in the "road fund" in the state treasurer's office, and shall be used only for the purpose of construction, reconstruction,

maintenance and repair of highways, and payment of principal and interest on state bonds issued for highway purposes.

(h) *Construction.* — The tax imposed by this article on the use of gasoline or special fuel in this State shall not be construed as taxing any gasoline or special fuel which the State is prohibited from taxing under the constitution of this State or the constitution or laws of the United States.

(i) *Effective date.* — The provisions of this section and the amendments to section three [§ 11-15A-3] of this article shall take effect on the first day of April, one thousand nine hundred eighty-three. (1983, c. 179.)

c. § 11-15-18. Tax on gasoline and special fuel.

(a) *General.* — All sales of gasoline or special fuel by distributors or importers, except when to another distributor for resale in this State, when delivery is made in this State, shall be subject to the tax imposed by this article, notwithstanding any provision of this article to the contrary. Sales of gasoline or special fuel by a person who paid the tax imposed by this article on his purchases of fuel, shall not thereafter be again taxed under the provisions of this article. This section shall be construed so that all gallons of gasoline or special fuel sold and delivered, or delivered, in this State are taxed one time.

(b) *Measure of tax.* — The measure of tax on sales of gasoline or special fuel by distributors or importers shall be the average wholesale price as defined and determined in subsection (c), section thirteen [§ 11-15A-13(c)], article fifteen-A of this chapter. For purposes of maintaining revenue for highways, and recognizing that the tax imposed by this article is generally imposed on gross proceeds from sales to ultimate consumers, whereas the tax on gasoline and special fuel herein is imposed on the average wholesale price of such gasoline and special fuel; in no case, for the purposes of taxation under this article, shall such average wholesale price be deemed to be less than ninety-seven cents per gallon of

gasoline or special fuel for all gallons of gasoline and special fuel sold during the reporting period, notwithstanding any provision of this article to the contrary.

(c) *Definitions.* — For purposes of this section:

(1) "Aircraft" shall include any airplane or helicopter that lands in this State on a regular or routine basis, and transports passengers or freight.

(2) "Aircraft fuel" shall mean gasoline and special fuel suitable for use in any aircraft engine.

(3) "Distributor" shall mean and include every person:

(A) Who produces, manufacturers, processes or otherwise alters gasoline or special fuel in this State for use or for sale; or

(B) Who engages in this State in the sale of gasoline or special fuel for the purpose of resale or for distribution; or

(C) Who receives gasoline or special fuel into the cargo tank of a tank wagon in this State for use or sale by such person.

(4) "Gasoline" shall mean and include any product commonly or commercially known as gasoline, regardless of classification, suitable for use as fuel in an internal combustion engine, except special fuel as hereinafter defined, including any product obtained by blending together any one or more products, with or without other products, if the resultant product is capable of the same use.

(5) "Importer" shall mean and include every person, resident or nonresident, other than a distributor, who receives gasoline or special fuel outside this State for use, sale or consumption within this State, but shall not include the fuel in the supply tank of a motor vehicle that is not a motor carrier.

(6) "Motor carrier" shall mean and include: (A) Any passenger vehicle which has seats for more than nine passengers in addition to the driver, any road tractor, tractor

truck or any truck having more than two axles, which is operated or caused to be operated, by any person on any highway in this State using gasoline or special fuel; and (B) any aircraft, barge or other watercraft, or locomotive transporting passengers or freight in or through this State.

(7) "Motor vehicle" shall mean and include automobiles, motor carriers, motor trucks, motorcycles and all other vehicles or equipment, engines or machines which are operated or propelled by combustion of gasoline or special fuel.

(8) "Retail dealer of gasoline or special fuel" shall mean and include any person not a distributor who sells gasoline or special fuel from a fixed location in this State to users.

(9) "Special fuel" shall mean and include any gas or liquid, other than gasoline, used or suitable for use as fuel in an internal combustion engine. The term "special fuel" shall include products commonly known as natural or casing-head gasoline and shall include gasoline and special fuel for heating any private residential dwelling, building or other premises; but shall not include any petroleum product or chemical compound such as alcohol, industrial solvent, heavy furnace oil, lubricant, etc., not commonly used nor practicably suited for use as fuel in an internal combustion engine.

(10) "Supply tank" shall mean any receptacle on a motor vehicle from which gasoline or special fuel is supplied for the propulsion of the vehicle or equipment located thereon, exclusive of a cargo tank. A supply tank includes a separate compartment of a cargo tank used as a supply tank, and any auxiliary tank or receptacle of any kind or cargo tank, from which gasoline or special fuel is supplied for the propulsion of the vehicle, whether or not such tank or receptacle is directly connected to the fuel supply line of the vehicle.

(11) "Tank wagon" shall mean and include any motor vehicle or vessel with a cargo tank or cargo tanks ordinarily used for making deliveries of gasoline or special fuel, or both, for sale or use.

(12) "Taxpayer" shall mean any person liable for the tax imposed by this article.

(13) "User" shall mean any person who purchases gasoline or special fuel for use or consumption.

(d) *Tax due.* — The tax on sales of gasoline and special fuel shall be paid by each taxpayer on or before the twenty-fifth day of each month, by check, bank draft, certified check or money order, payable to the tax commissioner for the amount of tax due for the preceding month, notwithstanding any provision of this article to the contrary.

(e) *Monthly return.* — On or before the twenty-fifth day of each month, the taxpayer shall make and file a return for the preceding month showing such information as the tax commissioner may require, notwithstanding any provision of this article to the contrary.

(f) *Compliance.* — To facilitate ease of administration and compliance by taxpayers, the tax commissioner may require distributors, importers and other persons liable for the tax imposed by this article on sales of gasoline or special fuel, to file a combined return and make a combined payment of the tax due under this article on sales of gasoline and special fuel, and the tax due under article fourteen [§ 11-14-1 et seq.] of this chapter, on gasoline and special fuel. In order to encourage use of a combined return each month and the making of a single payment each month for both taxes, the due date of the return and tax due under article fourteen [§ 11-14-1 et seq.] of this chapter is hereby changed from the last day of each month to the twenty-fifth day of each month, notwithstanding any provision in article fourteen [§ 11-14-1 et seq.] of this chapter to the contrary.

(g) *Dedication of tax to highways.* — All tax collected under the provisions of this section after deducting the amount of any refunds lawfully paid shall be deposited in the "road fund" in the state treasurer's office, and shall be used only for the purpose of constructing, reconstruction,

maintenance and repair of highways, and payment of principal and interest on state bonds issued for highway purposes.

(h) *Construction.* — This section shall not be construed as taxing any sale of gasoline or special fuel which this State is prohibited from taxing under the constitution of this State or the constitution or laws of the United States.

(i) *Effective date.* — The provisions of this section and the amendments to section nine [§ 11-15-9] of this article shall take effect on the first day of April, one thousand nine hundred eighty-three. (1983, c. 179.)

APPENDIX E

ENROLLED
COMMITTEE SUBSTITUTE
FOR
Senate Bill No. 1

(SENATORS TONKOVICH, MR. PRESIDENT (BY REQUEST) AND HARMAN, *original sponsors*)

[Passed July 23, 1986; in effect from passage.]

AN ACT to repeal section twenty-six, article fifteen-a, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend and reenact sections one, two, three, four, five, six, seven, eight, ten, eleven, thirteen, eighteen, twenty-one and twenty-two, article fifteen-a of said chapter; and to further amend said article fifteen-a by adding thereto two new sections, designated sections three-a and ten-a, all relating to the compensating use tax; defining terms used therein; imposing tax on the use in this state of tangible personal property; exempting from tax property that is per se exempt from the consumers sales and service tax; exempting from payment of the use tax transactions for which persons may issue an exemption certificate under the consumers sales and service tax for the same type of property; exempting sales of property upon which the consumers sales and service tax has been paid; and exempting tangible personal property brought into the state by a nonresident for his or her use or enjoyment while temporarily in this state; providing rule for determining tax when a nonresident person or business moves into this state; creating presumption that tangible personal property sold for delivery in this state was sold for use or other consumption in this state; providing for tax to be collected by retailers or remitted direct-

ly to the state tax commissioner; requiring retailers engaging in business in this state and making sales of tangible personal property for delivery into this state or with the knowledge, directly or indirectly, that the property is intended for use in this state to collect the use tax; permitting retailers not engaging in business in this state to collect the use tax; prohibiting retailers from absorbing tax; making it a misdemeanor to absorb tax; requiring quarterly remittance of collected tax by retailers; requiring users who do not pay tax to a retailer to quarterly remit such tax directly to the tax commissioner; authorizing credit against tax due on use of tangible personal property for which sales tax was lawfully paid in another state; allowing such credit to be applied against tax due on gasoline and special fuel consumed in this state after the thirtieth day of June, one thousand nine hundred eighty-five, which was subject to sales tax in another state; providing for imposition of use tax on gasoline and special fuels consumed in this state; providing rules for imposition and calculation of such tax; authorizing tax commissioner to semiannually determine average wholesale price of gasoline and special fuel, with such average wholesale price of gasoline and special fuel, with such average wholesale price to not be less than ninety-seven cents per gallon; providing rules for computation of tax due from motor carriers and for returns and payment of tax; dedicating such tax to highways; providing rules for construction of such tax; expressing legislative intent to tax gasoline and special fuel used or consumed in this state after the thirtieth day of June, one thousand nine hundred eighty-five, prohibiting the tax commissioner from refunding or establishing a credit for tax paid subsequent to said thirtieth day of June, when such claim for refund or credit is based on purported nonexistence of the tax; placing burden on seller to prove that sale was not at retail; providing for this burden to be met by seller taking, in good faith, a properly executed exemption certificate signed by the purchaser; requiring retailers to keep books and records; authorizing tax com-

missioner to examine such books and records; authorizing tax commissioner to revoke the business registration certificate of a retailer engaging in business in this state or of a retailer not engaging in business in this state who is registered to collect use tax for failure to comply with the requirements of the use tax law; and providing effective dates.

Be it enacted by the Legislature of West Virginia:

That section twenty-six, article fifteen-a, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed; that sections one, two, three, four, five, six, seven, eight, ten, eleven, thirteen, eighteen, twenty-one and twenty-two, article fifteen-a, chapter eleven of said code be amended and reenacted; and that said article fifteen-a be further amended by adding thereto two new sections, designated sections three-a and ten-a, all to read as follows:

ARTICLE 15A. USE TAX.

§ 11-15A-1. Definitions.

The following words, terms and phrases, when used in this article, have the meanings ascribed to them in this section, except where the context clearly indicates that a different meaning is required:

(1) "Business" means any activity engaged in by any person, or caused to be engaged in by any person, with the object of direct or indirect economic gain, benefit or advantage, and includes any purposeful revenue generating activity in this state.

(2) "Consumer" means any person purchasing tangible personal property from a retailer as defined in paragraph (7).

(3) "Lease" includes rental, hire and license.

(4) "Person" includes any individual, firm, partnership, joint venture, joint stock company, association, public or private corporation, cooperative, estate, trust, business

trust, receiver, executor, administrator, any other fiduciary, any representative appointed by order of any court or otherwise acting on behalf of others, or any other group or combination acting as a unit, and the plural as well as the singular number.

(5) "Purchase" means any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, for a consideration.

(6) "Purchase price" means the total amount for which tangible personal property is sold, valued in money, whether paid in money or otherwise: *Provided*, That cash discounts allowed and taken on sales shall not be included.

(7) "Retailer" means and includes every person engaging in the business of selling, leasing or renting tangible personal property for use within the meaning of this article, or in the business of selling, at auction, tangible personal property owned by the person or others for use in this state: *Provided*, That when in the opinion of the tax commissioner it is necessary for the efficient administration of this article to regard any salesmen, representatives, truckers, peddlers or canvassers as the agents of the dealers, distributors, supervisors, employees or persons under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors, employers or persons, the tax commissioner may so regard them and may regard the dealers distributors, supervisors, employers, or persons as retailers for purposes of this article.

(8) "Retailer engaging in business in this state" or any like term, unless otherwise limited by federal statute, shall mean and include but not be limited to any retailer having or maintaining, occupying or using, within this state directly or by a subsidiary, an office, distribution house, sales house, warehouse, or other place of business, or any agent (by whatever name called) operating within this state, under the authority of the retailer or its subsidiary,

irrespective of whether such place of business or agent is located here permanently or temporarily, or whether such retailer or subsidiary is admitted to do business within this state prusuant to section forty-nine, article one, chapter thirty-one of this code.

(9) "Sale" means any transaction resulting in the purchase of tangible personal property from a retailer.

(10) "Seller" means a retailer, and includes every person selling or leasing tangible personal property in a transaction which is subject to the tax imposed by this article.

(11) "Tax commissioner" or "commissioner" means the state tax commissioner, or his delegate.

(12) "Tangible personal property" means tangible goods, wares and merchandise when sold by a retailer for use in this state.

(13) "Taxpayer" includes any person within the meaning of this section, who is subject to a tax imposed by this article, whether acting for himself or as a fiduciary.

(14) "Use" means and includes the exercise by any person of any right or power over tangible personal property incident to the ownership, possession or enjoyment of such property, or by any transaction in which possession of or the exercise of any right or power over tangible personal property is acquired for a consideration, including any lease, rental or conditional sale of tangible personal property. As used in this definition, "enjoyment" includes a purchaser's right to direct the disposition of the property, whether or not the purchaser has possession of the property. The term "use" does not include the keeping, retaining or exercising any right or power over tangible personal property for the purpose of subsequently transporting it outside this state for use thereafter solely outside this state.

§ 11-15A-2. Imposition of tax.

(a) *General.* — An excise tax is hereby levied and imposed on the use in this state of tangible personal property to be collected and paid as hereinafter provided, at the rate of five percent of the purchase price of such property.

(b) Said tax is hereby imposed upon every person using tangible personal property within this state. That person's liability is not extinguished until such tax has been paid. A receipt with the tax separately stated thereon issued by a retailer engaged in business in this state, or by a foreign retailer who is authorized by the tax commissioner to collect the tax imposed by this article, relieves the purchaser from further liability for the tax to which the receipt refers.

(c) Purchases of tangible personal property made from the government of the United States or any of its agencies by ultimate consumers shall be subject to the tax imposed by this section. Industrial materials and equipment owned by the federal government within the state of West Virginia of a character not ordinarily readily obtainable within the state, shall not be subject to use tax when sold, if such industrial materials and equipment would not be subject to use taxes if such were sold outside of the state for use in West Virginia.

(d) This article shall not apply to purchases made by counties or municipal corporations.

§ 11-15A-3. Exemptions.

The use in this state of the following tangible personal property is hereby specifically exempted from the tax imposed by this article:

(1) All articles of tangible personal property brought into the state of West Virginia by a nonresident individual thereof for his or her use or enjoyment while temporarily within this state or while passing through this state, except

gasoline and special fuel: *Provided*, That fuel contained in the supply tank of a motor vehicle that is not a motor carrier shall not be taxable.

(2) Tangible personal property, the gross receipts from the sale of which are exempt from the sales tax by the terms of article fifteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, and the property is being used for the purpose for which it was exempted.

(3) Tangible personal property, the gross receipts from the sale of which are derived from the sale of machinery, supplies and materials to contractors, or to persons engaged in the business of manufacturing, transportation, transmission, communication or in the production of natural resources in this state: *Provided*, That purchases of gasoline or special fuel from distributors or importers shall be taxable.

(4) Tangible personal property, the gross receipts or the gross proceeds from the sale of which are required to be included in the measure of the tax imposed by article fifteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, and upon which the tax imposed by said article fifteen has been paid.

(5) Tangible personal property, the sale of which in this state is not subject to the West Virginia consumers sales tax.

(6) Mobile homes utilized by the owners thereof as their principal year-round residence and dwelling: *Provided*, That use of these mobile homes shall be subject to tax at the three percent rate.

§ 11-15A-3a. Moving residence or business into state.

The tax imposed by this article shall not apply to tangible personal property purchased outside this state for use outside this state by a person who at that time was a nonresident natural person, or a business entity not actually doing business within this state, who or which later brings such tangible personal property into this state in

connection with his establishment of a permanent residence or business in this state: *Provided*, That such property was purchased more than six months prior to the date it was first brought into this state, or six months prior to the establishment of such residence or business, whichever first occurs.

§ 11-15A-4. Evidence of use.

For the purpose of the proper administration of this article to prevent evasion of the tax, evidence that tangible personal property was sold by any person for delivery in this state shall be prima facie evidence that such tangible personal property was sold for use in this state.

§ 11-15A-5. How collected.

The tax herein imposed shall be collected in the following manner:

(1) The tax upon the use of all tangible personal property, which is sold by a retailer engaging in business in this state, or by such other retailer as the tax commissioner shall authorize pursuant to section seven of this article shall be collected by such retailer and remitted to the state tax commissioner, pursuant to the provisions of sections six through ten, inclusive, of this article.

(2) The tax upon the use of all tangible personal property not paid pursuant to subsection one of this section shall be paid to the tax commissioner directly by any person using such property within this state, pursuant to the provisions of section eleven of this article.

§ 11-15A-6. Collection by retailer.

(a) Every retailer engaging in business in this state and making sales of tangible personal property for delivery into this state, or with the knowledge, directly or indirectly, that the property is intended for use in this state, that are not exempted under the provisions of section three of this

article, shall at the tme of making such sales, whether within or without the state, collect the tax imposed by this article from the purchaser, and give to the purchaser a receipt therefor in the manner and form prescribed by the tax commissioner, if the tax commissioner shall, by regulation, so prescribe.

(b) Each such retailer shall list with the tax commissioner the name and address of all his agents operating in this state, and the location of any and all distribution or sales houses or offices or other places of business in this state.

§ 11-15A-7. Foreign retailers.

The tax commissioner may, in his discretion, upon application authorize the collection of the tax herein imposed by any retailer not engaging in business within this state, who, to the satisfaction of the tax commissioner, furnishes adequate security to insure collection and payment of the tax. Such retailer shall be issued, without charge, a permit to collect such tax in such manner, and subject to such regulations and agreements as the tax commissioner shall prescribe. When so authorized, it shall be the duty of such retailer to collect the tax upon all tangible personal property sold to his knowledge for use within this state, in the same manner and subject to the same requirements as a retailer engaging in business within this state. Such authority and permit may be canceled when, at any time, the tax commissioner considers the security inadequate, or that such tax can more effectively be collected from the person using such property in this state.

§ 11-15A-8. Absorbing tax; criminal penalty.

It shall be unlawful for any retailer to advertise or hold out or state to the public or to any purchaser, consumer or user, directly or indirectly, that the tax or any part thereof imposed by this article will be assumed or absorbed by the

retailer or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded. The tax commissioner shall have the power to adopt and promulgate rules and regulations for adding such tax, or the equivalent thereof, by providing different methods applying uniformly to retailers within the same general classification for the purpose of enabling such retailers to add and collect, as far as practicable, the amount of such tax. Any person violating any of the provisions of this section within this state shall be guilty of a misdemeanor and subject to the penalties provided in section twenty of this article.

§ 11-15A-10. Payment to tax commissioner.

Each retailer required or authorized, pursuant to section six or seven, to collect the tax herein imposed, shall be required to pay to the tax commissioner the amount of such tax on or before the fifteenth day of the month next succeeding each quarterly period. At such time, each retailer shall file with the tax commissioner a return for the preceding quarterly period in such form as may be prescribed by the tax commissioner showing the sales price of any or all tangible personal property sold by the retailer during such preceding quarterly period, the use of which is subject to the tax imposed by this article, and such other information as the tax commissioner may deem necessary for the proper administration of this article. The return shall be accompanied by a remittance of the amount of such tax, for the period covered by the return: *Provided*, That where such tangible personal property is sold under a conditional sales contract, or under any other form of sale wherein the payment of the principal sum, or a part thereof is extended over a period longer than sixty days from the date of sale thereof, the retailer may collect and remit each quarterly period that portion of the tax equal to five percent of that portion of the purchase price actually received during such quarterly period. The tax commissioner, if he

deems it necessary in order to insure payment to the state of the amount of such tax, may in any or all cases require returns and payments of such amount to be made for other than quarterly periods. The tax commissioner may, upon request and a proper showing of the necessity therefor, grant an extension of time not to exceed thirty days for making any return and payment. Returns shall be signed by the retailer or his duly authorized agent, and must be certified by him to be correct.

§ 11-15A-10a. Credit for sales tax liability paid to another state.

(a) A person is entitled to a credit against the tax imposed by this article on the use of a particular item of tangible personal property equal to the amount, if any, of sales tax lawfully paid to another state for the acquisition of that property: *Provided*, That the amount of credit allowed shall not exceed the amount of use tax imposed on the use of the property in this state.

(b) For purposes of this section:

(1) "Sales tax" includes a sales tax or compensating use tax imposed on the use of tangible personal property by the state in which the sale occurred; and

(2) "State" includes the District of Columbia but does not include any of the several territories organized by Congress.

(c) This section shall apply to claims for refund or credit of use tax filed after the thirty-first day of August, one thousand nine hundred eighty-six, for taxable purchases made on or after the first day of July, one thousand nine hundred eighty-five, that were legally subject to a sales tax or compensating use tax paid in another state and then also taxed under this article.

§ 11-15A-11. Liability of user.

Any person who uses any tangible personal property upon which the tax herein imposed has not been paid either to a retailer or direct to the tax commissioner as herein provided, shall be liable therefor, and shall on or before the fifteenth day of the month next succeeding each quarterly period pay the tax herein imposed upon all such property used by him during the preceding quarterly period in such manner and accompanied by such returns as the tax commissioner shall prescribe. All of the provisions of section ten with reference to such returns and payments shall be applicable to the returns and payments herein required.

§ 11-15A-13. Tax on gasoline and special fuel.

(a) *Imposition of tax.*

(1) *On deliveries in this state.*—Gasoline or special fuel furnished or delivered within this state to consumers or users is subject to tax at the rate imposed by section two of this article: *Provided*, That the amount of tax due under section two shall in no event be less than five percent of the average wholesale price of gasoline and special fuel and with such price to, in no case, be deemed to be less than ninety-seven cents per gallon for all gallons of gasoline and special fuel taxable under section two of this article.

(2) *On purchases out of state.*—An excise tax is hereby imposed on the use or consumption in this state of gasoline or special fuel purchased outside this state at the rate of five percent of the average wholesale price of such gasoline or special fuel, as determined under subsection (c), notwithstanding any provision of this article to the contrary: *Provided*, That gasoline or special fuel contained in the supply tank of a motor vehicle that is not a motor carrier shall not be taxable, except that gasoline or special fuel imported in the supply tank or auxiliary tank of construction equipment, mining equipment, track

maintenance equipment or other similar equipment, shall be taxed in the same manner as that in the supply tank of a motor carrier.

(b) *Definitions.*—Terms used in this section shall have the same meaning as when used in a comparable context in section eighteen, article fifteen of this chapter.

(c) *Determination of average wholesale price.*

(1) To simplify determining the average wholesale price of all gasoline and special fuel, the tax commissioner shall, effective with the period beginning the first day of the month of the effective date of this section and each first day of January, annually, thereafter, determine the average wholesale price of gasoline and special fuel for each annual period, on the basis of sales data gathered for the preceding period of the first day of July through the thirty-first day of October. Notification of the average wholesale price of gasoline and special fuel shall be given by the tax commissioner at least thirty days in advance of each first day of January, annual period, by filing notice of the average wholesale price in the state register, and by such other means as the tax commissioner deems reasonable: *Provided*, That notice of the average wholesale price of gasoline and special fuel for the first period shall be timely given if filed in the state register on the effective date of this section.

(2) The "average wholesale price" shall mean the single, statewide average per gallon wholesale price, rounded to the third decimal (thousandth of a cent), exclusive of state and federal excise taxes on each gallon of gasoline or diesel fuel, as determined by the tax commissioner from information furnished by distributors of gasoline or special fuel in this state, or such other information regarding wholesale selling prices as the tax commissioner may gather, or a combination of such information: *Provided*, That in no event shall the average wholesale price be determined to be less than ninety-seven cents per gallon of gasoline or special fuel.

(3) All actions of the tax commissioner in acquiring data

necessary to establish and determine the average wholesale price of gasoline and special fuel, in providing notification of his determination prior to the effective date of any change in rate, and in establishing and determining the average wholesale price of fuel, may be made by the tax commissioner without compliance with the provisions of article three, chapter twenty-nine-a of this code.

(4) In any administrative or court proceeding brought to challenge the average wholesale price of gasoline and special fuel as determined by the tax commissioner, his determination shall be presumed to be correct and shall not be set aside unless it is clearly erroneous.

(d) *Computation of tax due from motor carriers.*— Every person who operates or causes to be operated a motor carrier in this state shall pay the tax imposed by this section on the average wholesale price of all gallons of gasoline or special fuel used in the operation of any motor carrier within this state, under the following rules:

(1) The total amount of gasoline or special fuel used in the operation of the motor carrier within this state shall be that proportion of the total amount of gasoline and special fuel used in any motor carrier's operations within and without this state, that the total number of miles traveled within this state bears to the total number of miles traveled within and without this state.

(2) A motor carrier shall first determine the gross amount of tax due under this section on the average wholesale value, determined under subsection (c), of all gasoline and special fuel used in the operation of the motor carrier within this state during the preceding quarter, as if all gasoline and special fuel had been purchased outside this state.

(3) Next, the taxpayer shall determine the total tax paid under article fifteen of this chapter on all gasoline and special fuel purchased in this state for use in the operation of the motor carrier.

(4) The difference between (2) and (3) is the amount of tax due under this article when (2) is greater than (3), or the

amount to be refunded or credited to the motor carrier when (3) is greater than (2), which refund or credit shall be allowed in the same manner and under the same conditions as a refund or credit is allowed for the tax imposed by article fourteen-a of this chapter.

(e) *Return and payment of tax.*—Tax due under this article on the uses or consumption in this state of gasoline or special fuel shall be paid by each taxpayer on or before the twenty-fifth day of January, April, July and October of each year, notwithstanding any provision of this article to the contrary, by check, bank draft, certified check or money order, payable to the tax commissioner, for the amount of tax due for the preceding quarter. Every taxpayer shall make and file with his remittance, a return showing such information as the tax commissioner may require.

(f) *Compliance.*—To facilitate ease of administration and compliance by taxpayers, the tax commissioner may require motor carriers liable for the taxes imposed by this article on the use of gasoline or special fuel in the operation of motor carriers within this state, and the tax imposed by article fourteen-a of this chapter on such gallons of fuel, to file a combined return and make a combined payment of the tax due under this article and article fourteen-a of this chapter on such fuel. In order to encourage use of a combined return and the making of a single payment each quarter for both taxes, the due date of the return and tax due under article fourteen-a of this chapter is hereby changed from the last day of January, April, July and October of each calendar year, to the twenty-fifth day of such months, notwithstanding any provisions in article fourteen-a of this chapter to the contrary.

(g) *Dedication of tax to highways.*—All tax collected under the provisions of this section after deducting the amount of any refunds lawfully paid shall be deposited in the "road fund" in the state treasurer's office, and shall be used only for the purpose of construction, reconstruction, maintenance and repair of highways, and payment of

principal and interest on state bonds issued for highway purposes.

(h) *Construction.*—The tax imposed by this article on the use of gasoline or special fuel in this state shall not be construed as taxing any gasoline or special fuel which the state is prohibited from taxing under the constitution of this state or the constitution or laws of the United States.

(i) *Effective date.*—The provisions of this section and the amendments of section three of this article took effect on the first day of April, one thousand nine hundred eighty-three.

(j) *Validation.*—Inasmuch as there is currently litigation challenging the lawfulness of this section in the situation where a motor carrier purchases gasoline or special fuel in another state paying to that other state a sales tax thereon and then consumes that gasoline or special fuel in its operation of a motor carrier in this state, without being statutorily allowed a credit for such sales tax against the tax imposed by this article with respect to such gallonage of tax paid fuel consumed in this state; and inasmuch as section ten-a of this article reestablishes the allowance of such a credit and makes such allowance effectively retroactive and applicable to gasoline and special fuel consumed in this state after the thirtieth day of June, one thousand nine hundred eighty-five, the purported constitutional infirmity is cured. To avoid any question about whether this section was in effect subsequent to the thirtieth day of June, one thousand nine hundred eighty-five, this section is reenacted and expressly made retroactive to the first day of July, one thousand nine hundred eighty-five, and the tax commissioner shall not refund or credit any tax previously paid under this section due to a claim that the tax was not lawfully imposed subsequent to the thirtieth day of June, one thousand nine hundred eighty-five.

§ 11-15A-18. Seller must show sale not at retail; presumption.

The burden of proving that a sale was not taxable shall be upon the seller, unless he, in good faith, takes from the purchaser a certificate signed by and bearing the address of the purchaser setting forth the reason for exemption of the sale from imposition of the tax. To prevent evasion it shall be presumed that all proceds are subject to the tax until the contrary is clearly established. This certificate shall be substantially in the form prescribed by the tax commissioner.

§ 11-15A-21. Books; examination.

(a) Every retailer required or authorized to collect taxes imposed by this article and every person using in this state tangible personal property purchased on or after the first day of July, one thousand nine hundred fifty-one, shall keep such records, receipts, invoices, and other pertinent papers as the tax commissioner shall require, in such form as the tax commissioner shall require.

(b) In addition to the tax commissioner's powers set forth in article ten of this chapter, the tax commissioner or any of his duly authorized agents is hereby authorized to examine the books, papers, records and equipment of any person who either:

(1) Is selling tangible personal property; or

(2) Is liable for the tax imposed by this article, and to investigate the character of the business of any such person in order to verify the accuracy of any return made, or if no return was made by such person, to ascertain and determine the amount due under the provisions of this article. Any such books, papers and records shall be made available within this state for such examination upon reasonable notice when the tax commissioner shall deem it advisable and shall so order. However, where the taxpayer's records must be kept out-of-state, the taxpayer may upon being notified by the tax commissioner that an examination is to be made, elect to do one of the following: (1) Forthwith transport the required records to a convenient point in West

Virginia and notify the tax commissioner that they are available; or (2) pay the reasonable traveling expenses of the tax commissioner's representatives from Charleston, West Virginia, to the out-of-state place where the records are kept, and return, and reasonable living expenses of such representatives while engaged in their examination.

§ 11-15A-22. Canceling or revoking permits.

Whenever any retailer engaging in business in this state, or authorized to collect the tax herein imposed pursuant to section seven of this article, fails to comply with any of the provisions of this article or any orders, rules or regulations of the tax commissioner prescribed and adopted for this article under article ten of this chapter, the tax commissioner may, upon notice and hearing, hereinafter provided, by order, cancel the business registration certificate, if any, issued to such retailer under article twelve, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, or if such retailer is a corporation authorized to do business in this state under section forty-nine, article one, chapter thirty-one of said code, may certify to the secretary of state a copy of an order finding that such retailer has failed to comply with certain specified provisions, orders, rules or regulations. The secretary of state shall, upon receipt of such certified copy, revoke the permit authorizing said corporation to do business in this state, and shall issue a new permit only when such corporation shall have obtained from the tax commissioner an order finding that such corporation has complied with its obligations under this article. No order authorized in this section shall be made until the retailer is given an opportunity to be heard and to show cause why such order should not be made, and he shall be given twenty days' notice of the time, place and purpose of such hearing, which shall be heard as provided in section nine, article ten of this chapter. The tax commissioner shall have the power in his discretion to issue a new business registration certificate after such canceling.

Supreme Court, U.S.
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No. 86-1758

In The
Supreme Court of the United States
October Term, 1986

WATERWAYS ASSOCIATION OF PITTSBURGH,
Appellant,

v.

HERSCHEL H. ROSE, III, STATE TAX COMMISSIONER OF WEST VIRGINIA,
Appellee.

On Appeal from the Circuit Court of Kanawha County of West Virginia

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

The appellee respectfully disagrees with the appellant's presentation of the questions raised in its Jurisdictional Statement and feels that the following more fairly represents the questions for review:

1. Whether the appellant has the standing necessary to maintain this action and whether there exists a case or controversy sufficient to invoke the jurisdiction of the Court.

2. Whether the issue of preemption having not been raised in the proceedings below may be raised for the first time on appeal. If so, then whether the federal government has preempted the tax imposed by West Virginia Code § 11-15A-13.

3. Whether the properly apportioned, nondiscriminatory complementary gasoline or special fuel use tax imposed by West Virginia Code § 11-15A-13 is an unconstitutional burden on interstate commerce in violation of the Commerce Clause and the Due Process Clause of the United States Constitution.

4. Whether the tax imposed by West Virginia Code § 11-15A-13 constitutes a duty of tonnage, prohibited by Article I, Section 10, Clause 3, of the United States Constitution.

5. Whether the tax imposed by West Virginia Code § 11-15A-13 is prohibited under the terms of the Northwest Ordinance of 1787 and the Virginia Compact of 1789.

PARTIES TO THE PROCEEDING

The appellant, Waterways Association of Pittsburgh, a Pennsylvania corporation, is a nonprofit membership association (J.S. App. C). Appellant's members were not made parties to the proceeding by class action or otherwise. Rule 10 of the West Virginia Rules of Civil Procedure requires that "[i]n the complaint the title to the action shall include the name of all the parties * * *." This suit was commenced solely in the name of the appellant, an incorporated association. *See* Complaint for Declaratory Relief, Appendix B, *infra*. The appellee, Herschel H. Rose, III, is the former Tax Commissioner of the State of West Virginia. The current State Tax Commissioner and successor to Herschel H. Rose, III, is Michael E. Caryl.

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No. 86-1758

In The

Supreme Court of the United States

October Term, 1986

WATERWAYS ASSOCIATION OF PITTSBURGH,

Appellant,

v.

HERSCHEL H. ROSE, III, STATE TAX COMMISSIONER OF WEST VIRGINIA,

Appellee.

On Appeal from the Circuit Court of Kanawha County of West Virginia

MOTION TO DISMISS OR AFFIRM

Appellee, Tax Commissioner of the State of West Virginia, hereby moves, pursuant to Rule 16 of the Rules of this Court, to dismiss the appeal in this case or to affirm the judgment below on the grounds that the appellant lacks standing, the matter does not present a justiciable controversy, that the appeal does not present substantial federal questions, as well as other grounds which this appellee will present herein, all of which establish that the Court should not set this case for argument.

OPINION BELOW

A declaratory judgment action was commenced by the appellant in the Circuit Court of Kanawha County, West Virginia, seeking a determination as to the constitutionality of the West Virginia consumer sales and service tax and use tax on gasoline and motor fuels and also seeking refund of said taxes for certain of its members. On April 18, 1986, the Circuit Court of Kanawha County, held the challenged taxes valid between the date of their enactment and June 30, 1985, but invalid after June 30, 1985 (J.S. App. C). The opinion of the Circuit Court of Kanawha County is not officially reported.

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JURISDICTION

The West Virginia Supreme Court of Appeals denied appellant's petition for appeal of final order of the Circuit Court of Kanawha County, West Virginia. Appellant filed a notice of appeal (J.S. App. A, 1a) with the West Virginia Supreme Court of Appeals and Circuit Court of Kanawha County, West Virginia, on April 28, 1987. The jurisdictional statement was timely filed in this Court. The asserted jurisdiction of this Court rests upon 28 U.S.C. § 1257(2). As will be addressed herein, the pleadings and proof fail to establish that the appellant has the necessary standing to invoke the jurisdiction of this Court and further no "case" or "controversy" susceptible of judicial determination is presented.

—o—

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of Article I, Section 8, Clause 3; Article I, Section 10, Clause 3; and Article VI, Clause 2, of the United States Constitution and the Fourteenth Amendment thereto, of 26 U.S.C. § 4042 (1982), of the Northwest Ordinance of 1787 and Virginia Compact of 1789, and W. Va. Code § 11-15A-13 are set forth in the Jurisdictional Statement, Appendices D and E.

Other relevant constitutional and statutory provisions involved in this appeal are set forth in Appendix A, *infra*.

STATEMENT OF THE CASE

1. *The Enactment of W. Va. Code* § 11-15A-13. On February 13, 1983, the West Virginia Legislature passed House Bill 1657, amending Chapter 11, Articles 15 and 15A, of the West Virginia Code of 1931, as amended (hereinafter referred to as "Code"). House Bill 1657 became effective April 1, 1983, and provides for imposition of a tax on the sale, delivery, use or consumption in West Virginia of gasoline or special fuel.

Code 11-15-18 provides for a consumers sales and service tax on all sales of gasoline or special fuel by distributors or importers within the State of West Virginia unless the sale is to another distributor for resale (J.S. App. D, 35a). Code 11-15A-13(a) imposes a complementary use tax on the "use or consumption in this State of gasoline or special fuel purchased outside this State" and on all "gasoline or special fuel delivered within this State to consumers or users" at the equivalent rate of the consumers sales tax on gasoline or special fuel.

The computation of the fuel use tax allows the taxpayer to deduct the total tax paid under consumers fuel tax for use in the operation of the carrier in determining the amount of tax due. Code 11-15A-13(d) (J.S. App. D, 33a). Additionally, the taxpayer is allowed a reciprocal credit equal to the amount of sales or use tax paid in another state on fuel used or consumed in West Virginia.[1]

[1]Prior to July 1, 1985, a reciprocal use tax credit was provided equal to the combined amount or amounts of legally imposed sales or use taxes paid by the purchaser on tangible personal property to another state or another subdivision thereof. W. Va. Code § 11-10A-8(a) (1983). This credit was repealed when Chapter 11, Article 10A, of the West Virginia Code, the West Virginia Multistate Tax Compact, was repealed effective June 30, 1985. The West Virginia Legislature, during the Second

(Continued on following page)

The fuel use tax not only applies to commercial watercraft but also to all motor carriers which includes buses, tractor trucks, trucks with more than two axles, aircraft, or locomotive transporting passengers or freight in or through West Virginia. Code 11-15-18(c)(6) (J.S. App. D, 36a-37a). Further, the measure of the tax is "that proportion of the total amount of gasoline and special fuel used in any motor carrier's operations within and without this State, that the total number of miles traveled within this State bears to the total miles traveled within and without this State." Code 11-15A-13(d)(1) (J.S. App. D, 33a). Thus, the West Virginia tax is apportioned exactly to the miles traveled within this state.

Additionally, in construing the fuel use tax, a taxpayer, when reporting, shall not construe it as "taxing any gasoline or special fuel which the State is prohibited from taxing under the constitution of this State or the constitution or laws of the United States." Code 11-15A-13(h) (J.S. App. D, 35a).

2. *The Course of Litigation Below.* Waterways Association of Pittsburgh, the sole plaintiff below, filed a complaint for declaratory relief pursuant to the provisions of W. Va. Code § 55-13-1 *et seq.* and the provisions of Rule 57 of the West Virginia Rules of Civil Procedure in the Circuit Court of Kanawha County, West Virginia, on or about July 9, 1984. *See* Appendix B, *infra.*

The declaratory judgment action sought to invalidate Code 11-15A-13, which imposes a use tax on gasoline or

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Extraordinary Session of the 1986 Legislative Session, in response to the circuit court's ruling in this case, enacted Enrolled Committee Substitute for Senate Bill No. 1 (hereinafter "Senate Bill No. 1") (J.S. App. E, 40a). This remedial legislation amended and reenacted Code 11-15A-13, and made it retroactive to July 1, 1985. Senate Bill No. 1 further enacted Code 11-15A-10a which authorizes a credit for sales taxes paid in another state against West Virginia fuel use taxes imposed after June 30, 1985 (J.S. App. E, 50a).

special fuel consumed in the State on the grounds that said statute violates certain provisions of the Northwest Ordinance and the Virginia Compact, the Constitution of the State of West Virginia, and the Commerce, Due Process and Duty of Tonnage Clauses of the United States Constitution.

On or about August 10, 1984, Herschel H. Rose, III, then Tax Commissioner of the State of West Virginia, filed his answer in response to the complaint for declaratory relief denying that the tax is invalid on the grounds set forth in appellant's complaint. In addition, the Tax Commissioner responded that the appellant failed to state a claim upon which relief can be granted and that Code 11-10-14 contains the exclusive remedy for obtaining any state tax refund, whereupon the Tax Commissioner asked that the action be dismissed. *See* Appendix C, *infra*.

The Kanawha County Circuit Court, by Judge Workman, issued an opinion and final order on April 18, 1986. Without addressing the appellee's claims that the action failed to state a claim upon which relief can be granted and that an action to obtain a refund for state taxes cannot be maintained in a declaratory judgment proceeding, the lower court ruled that the West Virginia fuel use tax violates neither the Northwest Ordinance nor the Virginia Compact; it is not a duty of tonnage prohibited by Article I, Section 10, Clause 3, of the United States Constitution; does not violate the Commerce Clause, Article I, Section 8, Clause 3, of the United States Constitution; and that the statute is constitutional and valid in every respect between the date of its enactment and June 30, 1985. The lower court upheld the gasoline sales tax contained in Code 11-15-18. The appellant does not contest the sales tax on gasoline or special fuel. Appellant seeks review of the circuit court's decision and final order upholding the validity of the West Virginia fuel use tax (J.S. 5). The lower court further held that Code 11-15A-13 is unconstitutional and without effect after June 30, 1985, as it discriminates against interstate commerce and, therefore, violates Ar-

ticle I, Section 8, Clause 3, of the United States Constitution because on July 1, 1985, the general use tax credit for sales tax paid in other states was repealed. *See* Note 1, *supra.*

Both parties simultaneously filed petitions for appeal of the final order of the Circuit Court of Kanawha County, West Virginia, to the West Virginia Supreme Court of Appeals. The appellee, West Virginia State Tax Commissioner, argued, *inter alia,* that no actual and justiciable controversy exists between the parties and renewed his claim that the lower court erred in allowing an action for a refund of state taxes in a declaratory judgment action. The West Virginia Supreme Court of Appeals refused to grant both the appellee's and appellant's petitions for appeal on February 3, 1987. Subsequently, the appellant appealed the ruling of the Circuit Court of Kanawha County, West Virginia, to this Court.

3. *Statement of the Facts.* Appellant, a Pennsylvania corporation, brought this declaratory judgment action seeking to have Code 11-15-18 and Code 11-15A-13 declared invalid and unenforceable and seeking refunds for its unnamed "members." The parties stipulated that some of appellant's members are motor carriers within the meaning of Code 11-15-18(c)(6) who are engaged in the business of transporting products by barge or watercraft on navigable rivers within the State of West Virginia and other navigable rivers outside the state. At least 30 percent of the mileage within West Virginia of certain members is for one-point and/or two-point traffic. Specific facts, including the names of the individual members and their various contacts with West Virginia, are not in the record. However, it is apparent that certain members are engaged in other transportation activities in West Virginia. "In those instances where goods or employees are transported to or from barge loading points [within West Virginia], fuel use tax is paid on the fuel consumed in that separate transaction" (J.S. 19). The record fails to disclose the circum-

stances under which the members pay the fuel use tax, *i.e.*, delivery, storage, or use.

Appellant does not pay tax in West Virginia and is not engaged in the river transportation business in this state. However, some of appellant's members voluntarily report the tax on fuel purchased outside of West Virginia and delivered, used or consumed in this state. Other of appellant's members do not pay the tax in question because they do not do business in West Virginia (J.S. App. C, 8a). None of appellant's members has ever sought to apply for the use tax credit (J.S. App. C, 9a).

Appellant misconstrues the fuel use tax in its statement of facts when it declares that the "statute requires Appellant's members to pay taxes on the consumption of fuel in West Virginia even though they have no contact with West Virginia other than navigating in West Virginia waters" (J.S. 7). The fuel use tax is imposed on the furnishing or delivering within this state to consumers or users and on the use or consumption by carriers within this state of gasoline or special fuel purchased outside the state to the extent sales or use tax has not been paid in this state or in another state, provided that such imposition is not prohibited under the West Virginia Constitution, the United States Constitution, or federal laws.

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ARGUMENT

I. NO CASE OR CONTROVERSY IS PRESENTED WITHIN THE APPELLATE JURISDICTION OF THIS COURT AND THE APPELLANT HAS FAILED TO DEMONSTRATE THAT IT HAS STANDING TO ASSERT THE RIGHTS OF NON-PARTIES TO THIS PROCEEDING.

This controversy is not between the West Virginia State Tax Commissioner and a taxpayer aggrieved by an assessment of tax or a denial of a properly filed refund claim. Rather, it involves the appellant, a Pennsylvania incorporated association that does not pay West Virginia taxes, seeking both a declaratory judgment on the consti-

tutionality of the West Virginia fuel use tax and unspecified refunds on behalf of certain undisclosed members. The appellant is essentially seeking an advisory opinion or abstract determination advising what the law would be on an uncertain or hypothetical set of facts. *See* Appendix B, *infra.*

The judicial power with which this Court is vested by Article III, Section 1, of the United States Constitution extends by Article III, Section 2, only to "cases" and "controversies." If no "case" or "controversy" is presented for decision, this Court is without power to review the decree of the court below. *Muskrat v. United States,* 219 U.S. 346 (1911). For the reasons set forth below, this matter does not present a case or controversy within the appellate jurisdiction of this Court.

In making a jurisdictional determination, this Court looks to "the nature of the proceeding which the statute authorizes, and the effect of the judgment rendered upon the rights which appellant asserts." *Nashville, Chattanooga & St. Louis Railway v. Wallace,* 288 U.S. 249, 259 (1933).

A state declaratory judgment may be reviewed in this Court provided that the matter retains the essentials of an adversary proceeding involving a real controversy which is finally determined by the judgment of the state court. *Poe v. Ullman,* 367 U.S. 497 (1961), *reh. den.,* 368 U.S. 869 (1961); *Nashville, supra.* The test is whether "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil Co.,* 312 U.S. 270, 273 (1941).

The West Virginia Uniform Declaratory Judgments Act empowers "[a]ny person" whose "rights, status or other legal relations are affected by a statute, municipal ordinance or franchise" to bring a declaratory judgment action. *See* Code 55-13-2. By the terms of the statute itself, an action for declaratory relief requires the joining

of "all persons * * * who have or claim any interest which would be affected by the declaration * * *." Code 55-13-11. The Act requires the presence of all essential parties, because in their absence "merits of the cause [can] not be fully and completely adjudicated." *Mainella v. Board of Trustees,* 126 W. Va. 183, 188, 27 S.E.2d 486, 489 (1943).

The appellant's members were not made parties to this proceeding. Thus, a declaration of their rights in this context would be "ineffective, unenforceable and could serve no purpose." *Town of South Charleston v. Board of Education,* 132 W. Va. 77, 84, 50 S.E.2d 880, 883 (1948). Further, claims for refunds of state taxes are specifically *excluded* from being sought in a state declaratory judgment action. Code 11-10-14(i) provides the *exclusive remedy* for refund of state taxes "in lieu of any other remedy including the Uniform Declaratory Judgment Act." *See also Chesapeake and Potomac Co. v. State Tax Department,* 161 W. Va. 77, 80-82, 239 S.E.2d 918, 920-921 (1977); *Walter Butler Building Co. v. Soto,* 142 W. Va. 616, 630, 97 S.E.2d 275, 284 (1957). Appellant's members have failed to exhaust the available administrative remedies. As a matter of state law, this action is not maintainable between these parties, and the judgment rendered would have no effect upon the appellant's members.

This litigation does not contain the essentials of an adversary proceeding, involving a real and substantial controversy. *See Old Colony Trust Co. v. Commissioner of Internal Revenue,* 279 U.S. 716, 724 (1929). The proceeding terminating in the final order below was not between truly adverse parties, *i.e.,* taxpayer and taxing authority, seeking a determination of *their* legal rights. *Muskrat v. United States.* There is no evidence in the record that valuable legal rights asserted by the appellant are threatened with imminent invasion by appellee, and will be directly affected to a specific and substantial degree by the decision below.

The appellant is not subject to, and has no duty to pay, the challenged tax and is, therefore, attempting to

secure an abstract determination by the Court of the validity of the West Virginia tax. *Muskrat v. United States, supra; Texas v. Interstate Commerce Commission,* 258 U.S. 158, 162 (1922). In other words, the appellant is seeking a determination of abstract questions or issues framed for the purpose of invoking the advice of the Court without real parties. This Court cannot deal in abstractions. Essential facts concerning each member were not made a part of the record. Commerce Clause analysis requires a "case-by-case adjudication." This Court is being asked to resolve difficult constitutional issues on nonexistent, hypothetical, or incomplete facts. *Liberty Warehouse Co. v. Grannis,* 273 U.S. 70 (1927). This Court has stated that it will not decide important constitutional questions unnecessarily or hypothetically. *City of Cincinnati v. Vester,* 281 U.S. 439, 449 (1930).

Further, this Court has refused to give advisory opinions. The refusal is based on "the implicit policies embodied in Article III, and not history alone." *Flast v. Cohen,* 392 U.S. 83 (1968). This policy recognizes the risk that comes from passing on abstract questions rather than limiting decisions to concrete cases in which a question is precisely framed by a clash of genuine adversary argument exploring every aspect of the issue. *See, e.g., United State v. Fruehauf,* 365 U.S. 146 (1961).

On the bare facts presented, this litigation is not presently ripe for summary adjudication. The Court, in abstaining from hearing this appeal at this time, will be in a far better position to decide the constitutional issues later when an aggrieved taxpayer is properly before it. In that situation, the appellee, State Tax Commissioner, at the administrative level, and the state courts, on appellate review, will have the opportunity to authoritatively construe the challenged statute as applied to a concrete set of facts. This would significantly advance this Court's ability to deal with the legal issues presented and aid in their proper resolution. This Court will exercise a sound discretion in the public interest to avoid needless friction

with state policies that may result from tentative constructions of state statutes and premature adjudication on their constitutionaliy "which may be displaced tomorrow by a state adjudication." *Railroad Commission v. Pullman Company,* 312 U.S. 496, 500 (1941). (Citations omitted.) A possible interpretation of state tax law which might render it unconstitutional, but which has not been and may never be adopted by the state taxing officials or the state courts, does not present a case. *Edelman v. Boeing Air Transport,* 289 U.S. 249, 253 (1933).

Finally, the appellant lacks standing necessary to maintain the action. Based upon the facts presented, this Court is being asked to decide an ill-defined controversy over constitutional issues, of a case which is hypothetical or abstract in character. Whether an appellant has standing to attack a state statute in this Court is a separate issue to which this Court must bring its own independent judgment. *Cramp v. Board of Public Instruction,* 368 U.S. 278, 282 (1961); *Tileston v. Ullman,* 318 U.S. 44 (1943); *Doremus v. Board of Education,* 342 U.S. 429 (1952).

The "gist of the question of standing" is whether the appellant has alleged "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions[.]" *Baker v. Carr,* 369 U.S. 186, 204 (1962). Due to the nature of a declaratory judgment action, the requirements of standing are strict. *See Griswold v. Connecticut,* 381 U.S. 479, 481 (1965).

This Court, in *Bender v. Williamsport Area School District,* 475 U.S. —, 106 S. Ct. 1326, 1331-1332, 89 L. Ed. 2d 501, 511-512 (1986), stated:

> "In such cases [when a constitutional question is presented] we have strictly adhered to the standing requirements to ensure that our deliberations will have the benefit of adversary presentation and a full development of the relevant facts. Thus, as we em-

phasized in Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982):

> '[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," [cites omitted], and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision" [cites omitted].' "

Accordingly, appellant, who is not a West Virginia taxpayer and is not affected by Code 11-15A-13, cannot be heard to complain about the hypothetical effects of the statute upon others who are not parties to this litigation. Nothing in the record demonstrates that the appellee has taken any action or plans to take action against the appellant or its members with respect to the West Virginia tax. Further, a person who lacks financial interest in taxes alleged to have been collected by the state has no legal standing to sue for their refund.

Ordinarily, a party has no standing to assert the rights of third persons. *Craig v. Boren,* 429 U.S. 190 (1976), *reh. den.,* 429 U.S. 1124 (1977). This is a "salutary 'rule of self-restraint' designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative." *Craig,* 429 U.S. at 193. (Citations omitted.) Further the "members" have an adequate, speedy, and efficient method to resolve this controversy. *See* Code 11-10-9; Code 11-10-14.

Granted, an association may have standing to assert the federal rights of its members in limited and extraordinary situations, but this case does not fall into that category. *See, e.g., N.A.A.C.P. v. Alabama,* 357 U.S. 449 (1958). Here, appellant has failed to demonstrate that

there exists a sufficient nexus between the association's activities and the rights claimed on behalf of its members.

In conclusion, this litigation does not present a case or controversy within the appellate jurisdiction of this Court. Further, the appellant has failed to demonstrate that it has the necessary standing to seek redress in this Court. No showing of personal injury was made as a result of any illegal conduct or threatened conduct of the appellee. For the foregoing reasons, this appeal should be dismissed for jurisdictional reasons.

II. THE APPELLANT FAILED TO RAISE THE ISSUE OF WHETHER THE TAX HAS BEEN PREEMPTED BY THE FEDERAL GOVERNMENT AND, THEREFORE, THIS ISSUE CANNOT BE CONSIDERED ON APPEAL BY THIS COURT.

The appellant, in its Jurisdictional Statement, raises the issue of whether, under the Supremacy Clause of the United States Constitution, the federal government has preempted the West Virginia fuel use tax by enacting a federal tax on fuel used or consumed in river transportation for the purpose of raising revenue to construct and rehabilitate navigable waterways. *See* 26 U.S.C. § 4042 (1982).

In order to obtain review of a state court decision in this Court, it must affirmatively appear from the record that a substantial federal question was presented to the state court and was passed upon by that court. *Lerner v. Casey,* 357 U.S. 468 (1958); *Coleman v. Miller,* 307 U.S. 433 (1939). An issue not presented to or considered by the state court will not be considered as an initial matter by this Court. *Carter v. Kentucky,* 450 U.S. 288, 304 (1981); *Sandstrom v. Montana,* 442 U.S. 510, 527 (1979). If nothing in the record indicates that the federal question was presented to the state court, this Court will not take judicial notice that the federal question might have been involved in the case. *Durley v. Mayo,* 351 U.S. 277, 281,

reh. den., 352 U.S. 859 (1956); *Honeyman v. Hanan*, 300 U.S. 14, 18 (1937).

The appellant failed to raise this issue in its complaint for declaratory relief. *See* Appendix B, *infra*. Further, the state court did not consider this Supremacy Clause issue in its Opinion and Final Order (J.S. App. C). Therefore, this Court should dismiss this issue for "want of a properly presented federal question." *See, e.g., Hunt v. Collins*, 457 U.S. 1127 (1982); *Doe v. Delaware*, 450 U.S. 382 (1981).

In any event, the use tax embodied in Code 11-15A-13 (hereinafter referred to as the "fuel use tax") plainly withstands scrutiny in light of federal laws. The state law is not inconsistent with the federal law, and it is possible to comply with the mandates of both federal and state law. Further, nothing in the federal legislation indicates that Congress intended to preempt all state taxation of commercial navigation.

As this Court has frequently indicated, "'[p]reemption of state law by federal statute or regulation is not favored "in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."'" *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634 (1981). (Citations omitted.) State fuel taxes on airlines and motor carriers have been routinely upheld, notwithstanding extensive federal regulation and federal fuel taxes imposed on those enterprises. Waterway transportation has been put on the same constitutional footing as other transportation enterprises. *Ott v. Mississippi Valley Barge Line Company*, 336 U.S. 169, 175 (1949). Therefore, this claim should be summarily dismissed.

III. THE TRANSPORTATION AND RELATED BUSINESS ACTIVITIES OF APPELLANT'S MEMBERS CARRIED ON WITHIN WEST VIRGINIA PROVIDE THE NEXUS NECESSARY FOR THE IMPOSITION OF WEST VIRGINIA'S NONDISCRIMINATORY, PROPERLY APPORTIONED FUEL USE TAX AND THE MEASURE OF SUCH TAX, BY VIRTUE OF ITS APPORTIONMENT FORMULA, IS INTRINSICALLY RELATED TO THE BENEFITS AFFORDED BY THE STATE.

The appellant next argues that the West Virginia tax offends the Commerce and Due Process Clauses of the United States Constitution. Several compelling reasons exist requiring dismissal of the appellant's claims or affirmance of the West Virginia court's decision.

First, the exact challenge under the Commerce Clause in this case has been previously presented to this Court in *Union Barge Line Corp. v. Hardesty, cited in Western Maryland Ry. Co. v. Goodwin,* — W. Va. —, 282 S.E.2d 240 (1981), *appeal dismissed,* 456 U.S. 952 (1982). In that case, a nondiscriminatory, properly apportioned state carrier income tax on the income of an out-of-state barge company was challenged. The taxpayer in *Union Barge* was in a position very similar to that of the appellant's members. Union Barge, a Pennsylvania-based corporation headquartered in Pittsburgh and not qualified to do business in West Virginia, was engaged in transporting freight in barges along the navigable waters of the United States. The West Virginia Supreme Court found sufficient nexus and services fairly related to the tax and upheld the tax. *Id.,* 282 S.E.2d at 251-254.

This Court dismissed the appeal for want of a substantial federal question. Therefore, the West Virginia Court's findings of substantial nexus and services fairly related to the tax of a Pittsburgh-based barge company are valid. This Court's dismissal of the *Union Barge* appeal for want of a substantial federal question should

serve as controlling precedent on the Commerce Clause issue.

Second, appellant's arguments in the instant matter are factually unsupported. These arguments are not worthy of the consideration of this Court. Appellant proved no facts in the lower court that would justify the invalidation of the West Virginia tax. A taxpayer must show that a state tax "places a burden on interstate commerce in a constitutional sense." *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 462-463 (1959). The appellant is asking this Court to resolve difficult constitutional issues on nonexistent, hypothetical, or incomplete facts. Commerce Clause analysis requires a "case-by-case" adjudication. The record is devoid of any facts regarding *individual* taxpayers. Nothing in the record minimizes the obvious nexus between West Virginia and the appellant's members; indeed, the tax is only applied on carrier operations conducted within West Virginia. The appellant has not attacked the apportionment of the West Virginia tax. Further, the appellant concedes that the West Virginia tax does not discriminate against interstate commerce "because it is equally applied to interstate as well as intrastate traffic" (J.S. 18-19). Nothing in the record suggests that the tax is not fairly related to services and protections of the state. In short, because appellant has relied on the *per se* approach of *Helson v. Kentucky,* 279 U.S. 245 (1929), it has developed no factual basis, except naked allegations, on which to declare the West Virginia tax unconstitutional as applied to its members on their delivery, use, or consumption of tangible personal property in West Virginia. *See Department of Revenue of Washington v. Association of Washington Stevedoring Companies,* 435 U.S. 734, 750-751 (1978).

Third, notwithstanding *Helson,* fuel use taxes, similar to the West Virginia tax, have been upheld even though the fuel is the motive power essential for interstate journey. *See e.g., United Air Lines v. Mahin,* 410 U.S. 623

(1973); *Edelman, supra; Nashville, supra.* This Court has recognized that interstate commerce can be "required to pay a nondiscriminatory share of the tax burden." *Braniff Airways v. Nebraska State Board of Equalization,* 347 U.S. 590, 598 (1954); *Ott, supra.*

Code 11-15A-13(a) provides that an excise tax is imposed on the delivery, use, or consumption of gasoline or special fuel in this state. Use taxes have been sustained by this Court when challenged on constitutional grounds, because use taxes are complimentary in nature to sales taxes. *Henneford v. Silas Mason Co.,* 300 U.S. 577 (1937). It is entirely proper for a state to enact a compensatory tax to neutralize or partially offset an economic advantage previously enjoyed by interstate commerce to the disadvantage of local commerce that was caused by operation of that state's taxing scheme.

This Court's most recent decisions have distilled the controlling Commerce Clause principles into a four-part test. In *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279 (1977), this Court held that a state tax is valid under the Commerce Clause if it (1) has a substantial nexus with the state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. The appellant argues that the tax in question violates the first and fourth prongs of this test.

Complete Auto "held that a State under appropriate conditions may tax directly the privilege of conducting interstate business." *Washington Stevedoring,* 435 U.S. at 745. *Complete Auto* was "a movement case which held that a state privilege tax on the business of moving goods in interstate commerce is not *per se* unconstitutional." *Id.,* 435 U.S. at 748. Absolute immunity from state taxation does not exist for interstate business because "[it] was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the

cost of doing the business." *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 254 (1938).

Complete Auto and *Washington Stevedoring,* taken together, signaled the demise of what has been called the "Formal Rule" of state taxation of interstate commerce. *See* Lockhart, *A Revolution in State Taxation of Commerce,* 65 Minn. L. Rev. 1025 (1981). The "Formal Rule" is the name given to the pre-*Complete Auto* rule in which this Court held invalid any state tax on any activity or process in interstate commerce because such tax was thought to violate the exclusive power of Congress. It is now clear that a state may, under appropriate conditions, tax interstate business. The correct analysis today focuses on the economic consequence or impact of the taxing scheme being examined. *Mobil Oil Corporation v. Vermont,* 445 U.S. 425 (1980); *Moorman Manufacturing v. Bair,* 437 U.S. 267 (1978).

While framing its argument in terms of *Complete Auto,* the appellant relies heavily on cases decided under the "Formal Rule." These cases must be reevaluated under the *Complete Auto* test, because their "Formal Rule" theoretical underpinnings have been swept away. Paying lip service to the *Complete Auto* test, the appellant bases its challenge on a line of "Formal Rule" fuel tax cases which includes *Nashville, supra; Eastern Air Transport, Inc. v. South Carolina Tax Commission,* 285 U.S. 147 (1932); *Edelman, supra;* and *United Airlines, supra.* Although the fuel tax was upheld in each of these cases, the holdings in all of these cases are predicated upon the validity of the case most heavily relied upon by the appellant, *Helson v. Kentucky, supra.*

In *Helson,* the taxpayer operated a ferry boat along the Ohio River from Kentucky to Illinois. The situs of their offices, residences and property was in Illinois. The gasoline to be taxed was purchased in Illinois. The parties stipulated that 75% of their fuel was burned in Kentucky waters during interstate journeys. The Court struck down the use tax because:

> "A tax which falls directly upon the use of one of the means by which commerce is carried on directly burdens that commerce. If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce, as this Court definitely has held, it is little more than repetition to say that such a tax cannot be laid upon the use of a medium by which such transportation is effected. * * *" *Id.*, 279 U.S. at 252.

The Court's reasoning in *Helson* is clearly a high-water mark in "Formal Rule" analysis. While *Helson* has not been explicitly overruled by this Court, it was cited with disapproval in *Commonwealth Edison*, 453 U.S. at 614-615.

The modern Commerce Clause decisions of this Court are grounded in a "practical analysis" (*Commonwealth Edison*, 453 U.S. at 616) and represent an "evolutionary process" [*Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979)] of "case-by-case [adjudication]." (*Northwestern States Portland Cement*, 358 U.S. at 457.) As a result, the Court has been compelled in recent years to overturn a number of decisions that, over the course of time, were seen to depart from sound constitutional analysis.[2] Here, decisions such as *Complete Auto* represent "more recent precedent and a new analysis [that] require rejection of [the *Helson*] reasoning." *Washington Stevedoring*, 435 U.S. at 745.) Only in this way can the Court " 'establish a consistent and rational method of inquiry' " (*Commonwealth Edison*, 453 U.S. at 615) and "bring [its] analytical framework into conformity with practical realities" (*Hughes v. Oklahoma*, 441 U.S. at 335).

In the end, *Helson v. Kentucky* has become "a derelict on the waters of the law" [*Lambert v. California*, 355 U.S.

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[2] *See, e.g., Commonwealth Edison*, 453 U.S. at 614-617, overruling *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922) (Commerce Clause); *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 743-750 (1978), overruling *Puget Sound Stevedoring Co. v. State Tax Comm'n*, 302 U.S. 90 (1937), and *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947) (Commerce Clause); *Complete Auto*, 430 U.S. at 278-289, overruling *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951) (Commerce Clause). *See also Northwestern States Portland Cement Co.*, 358 U.S. at 457-458.

225, 232 (1957) (Frankfurter, J., dissenting)] and it is out of harmony both with more recent Commerce Clause jurisprudence and with the realities of the modern transportation industry. The West Virginia tax works to equalize all intrastate and interstate carriers. Further, because of the reciprocal use tax credit and the apportionment formula, the tax does not impose multiple burdens on said commerce. A rule that has been rendered obsolete by subsequent legal and factual developments has no legitimate claim to continued application.

"The Commerce Clause does not state a prohibition; it merely grants specific power to Congress." *Washington Stevedoring,* 435 U.S. at 749. Further, "[a]ll tax burdens do not impermissibly impede interstate commerce. The Commerce Clause balance tips against the tax *only when it unfairly burdens commerce by exacting more than a just share from interstate activity.*" *Id.,* at 748. (Emphasis supplied.) The exaction in issue is not clearly excessive, and is carefully crafted to avoid multiple burdens.

Navigable waters within a state are "public highways." States are not precluded from making improvements to these "highways." Furthermore, the construction and maintenance of access roads to docking facilities greatly facilitate the commerce carried on by the appellant's members. Motor carriers in this state who exclusively use the land highways are subject to a much greater tax burden. West Virginia has a significant interest in exacting from interstate commerce its fair share of the cost of state government. *Complete Auto,* 430 U.S. at 288.

1. *Appellant's Members have Substantial Nexus with West Virginia.* The appellant attempts to attach the "local taxable event" requirement in *Edelman, Nashville,* and *United Airlines* onto the *Complete Auto's* minimal nexus requirement. However, the distinction between indirect and direct taxation of interstate commerce has been discarded and with it the "local taxable event" requirement. "Nexus" has been defined to mean a "minimal connection" or definite link between the taxing state and the person or

transaction the state seeks to tax. *National Bellas Hess, Inc. v. Illinois,* 386 U.S. 753 (1967); *Moorman Manufacturing, supra.* Here, the activity being taxed—the delivery, use, or consumption of fuel—is exactly apportioned to, and occurs entirely within West Virginia. The Court is asked to examine a properly apportioned, nondiscriminatory, complementary use tax which the appellant argues offends the Commerce Clause when applied to its activities due to insufficient nexus. This Court has repeatedly acknowledged that apportioned taxes do not offend constitutional limitations upon state interference with interstate commerce since the apportionment formula is designed to reach only income attributable to in-state activity. Thus, nexus is inherent. This Court, in *Northwestern States Portland Cement Co.,* recognized, that while unapportioned taxes by their very nature create the possibility that interstate commerce may have to pay more than its fair share, apportioned taxes by design preclude such possibility. The apportionment formula of West Virginia's fuel use tax restricts its imposition to only that portion of a taxpayer's transportation activities wholly conducted in the State and thereby avoids any improper interference with interstate commerce.

The appellant's claim that there is insufficient nexus merely because the watercraft are on their way to another state is similar to the argument made by the taxpayer in *Union Barge,* 282 S.E.2d at 251-253. Here, the factual pattern is virtually identical. If the taxpayer in *Union Barge* had nexus, so must the affected members of the appellant association.

The West Virginia Court, in *Union Barge,* found additional support in *Ott v. Mississippi Valley Barge Line, supra.* There, an *ad valorum* tax was sustained on barges moving on the Mississippi and Ohio Rivers. The critical factor in *Ott* was that the tax was apportioned exactly to the number of miles traveled in Louisiana waters. When such is the case, there is no risk of multiple taxation. As in *Ott* and *Union Barge,* the fuel use tax is apportioned ex-

actly to the number of miles traveled in West Virginia waters.

2. *The Tax is Fairly Related to the Services Provided by the State.* The appellant next argues that the fuel tax is invalid under the fourth prong of the *Complete Auto* test. Once again, the appellant, while paying lip service to the *Complete Auto* test, has applied the wrong rule. Appellant seeks to have the Court apply the rule in *Evansville-Vanderburgh Airport Authority v. Delta Airlines, Inc.,* 405 U.S. 707 (1972). In *Delta Airlines,* the Court sustained the constitutionality of per-passenger *fee* upon the enplaning of certain passengers at an airport. The fee was used to defray the cost of that particular state facility. The appellant cites that case for the proposition that "*tolls* must reflect a 'uniform, fair and practical standard' relating to public expenditures * * *." (Emphasis added.) *Id.* 404 U.S. at 716-717. "But the levy is a tax, not a toll or charge for the use of the highways." *Nashville,* 288 U.S. at 268.

There is no similarity between a user fee on a particular state-maintained facility and the West Virginia tax. The fuel use tax is a general revenue tax on the delivery, use, or consumption within West Virginia of tangible personal property purchased in another state. States, in enacting general revenue taxes, have considerable latitude. *Commonwealth Edison,* 435 U.S. at 622. The constitutionality of general revenue taxes does not depend upon a specific return or a specific governmental service. See *Nashville,* 288 U.S. at 268.

The question is not one of "value received" by a taxpayer. The mere fact that the West Virginia Legislature has chosen to dedicate the funds generated by the sales and use taxes on gasoline and special fuels to the "highway fund" is simply not a relevant or proper inquiry after *Complete Auto.* A state "'is free to pursue its own fiscal policies, unembarrassed by the Constitution.'" *Commonwealth Edison,* 453 U.S. at 625, *citing Wisconsin v. J. C. Penney Co.,* 311 U.S. 435, 444 (1940).

In *Commonwealth Edison*, the taxpayer's complaint was that "the *amount* the State receives in [severanc] taxes far exceeds the *value* of the services provided to the coal mining industry." 453 U.S. at 621. (Emphasis by the Court.) There, the Court responded that:

> "[T]here is no requirement under the Due Process Clause that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services provided to the activity. Instead, our consistent rule has been:
>
> * * *
>
> > "'A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. * * * '" 453 U.S. at 622-623.

According to the Court, this latitude afforded the states under the Due Process Clause is not "somehow divested by the Commerce Clause." *Id.*, 453 U.S. at 623. The Court went on to state this test:

> "The revelant inquiry under the fourth prong of of the Complete Auto Transit test is not * * * the *amount* of the tax or the *value* of the benefits allegedly bestowed as measured by the costs the State incurs on account of the taxpayer's activities. Rather, the test is closely connected to the first prong of the Complete Auto Transit test. Under this threshold test, the interstate business must have a substantial nexus with the State before *any* tax may be levied on it. * * * Beyond that threshold requirement, the fourth prong of the Complete Auto Transit test imposes the additional limitation that the *measure* of the tax must be reasonably related to the extent of the contact * * *." 453 U.S. at 625-626 (footnotes and citation omitted; emphasis by the Court).

In *Commonwealth Edison,* this test was met. "Because it is measured as a percentage of the value of the coal taken, the Montana tax is in 'proper proportion' to [taxpayers'] activities within the State." *Id.,* 453 U.S. at 626. West Virginia's tax also manifestly passes this proportionality test. The measure of the tax is related exactly to the extent of a taxpayer's contact with West Virginia, being based upon the percentage of miles within West Virginia to total miles within and without the state.

3. *The Tax Does Not Violate the Due Process Clause.* The limitation imposed by the Due Process Clause upon state power to impose taxes upon commercial watercraft that ply the inland waters was succinctly stated in *Ott v. Mississippi Valley Barge Co.*: "So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State. * * * Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State." *Id.,* 336 U.S. at 174. (Citations omitted.)

The above language clearly establishes, with respect to the Due Process Clause, that properly apportioned state taxes are fairly related to the opportunities, benefits, or protections afforded by the taxing state. Since, in the instant case, appellant does not challenge the validity of West Virginia's fuel use tax apportionment formula, there is no genuine issue with regard to the due process test. West Virginia's use tax, by virtue of its apportionment formula, is intrinsically related to opportunities, benefits and protections afforded by the state.

The appellant argues that its members do not receive any special benefit from the use of the funds raised by the fuel use tax since the funds are dedicated to the construction and improvement of highways. However, the constitutional power to levy taxes does not depend upon the enjoyment by the taxpayer of any special benefit from the use of the funds raised by taxation. *Commonwealth Edison,* 453 U.S. at 622-623; *Nashville,* 288 U.S. at 268.

In *Nashville,* this Court upheld a fuel excise tax levied on an interstate railroad company which did not use the highways. The proceeds of such tax, like West Virginia's excise tax, were used solely in the construction and maintenance of highways. *Id.,* 288 U.S. at 268. That holding is equally applicable to watercraft plying the inland waters. There is "no practical difference so far as either the Due Process Clause or the Commerce Clause is concerned whether it is vessels or railroad cars that are moving in interstate commerce." *Ott,* 336 U.S. at 174. Therefore, this Court should summarily dismiss the appellant's Commerce and Due Process claims.

IV. THE TAX IMPOSED BY WEST VIRGINIA CODE § 11-15A-13 DOES NOT CONSTITUTE A DUTY OF TONNAGE, PROHIBITED BY ARTICLE I, SECTION 10, CLAUSE 3, OF THE UNITED STATES CONSTITUTION.

The appellant argues that the West Virginia tax, insofar as it pertains to its members, constitutes a "duty of tonnage" in violation of the United States Constitution because a barge towboat cannot navigate in West Virginia waters without being subject to the tax. Besides misconstruing the nature of the tax, appellant's argument is frivolous and does not present a substantial federal question worthy of consideration by this Court.

The "duty of tonnage" prohibition forbids a tax "upon the privilege of access by vessels or goods to the ports or to the territorial limits of a state," and applies to taxes and duties "which operate to impose a charge for the privilege of entering, trading in, or lying in a port." *Clyde Mallory Lines v. Alabama,* 296 U.S. 261, 266 (1935). This is not that sort of tax.

The fuel use tax is an apportioned, nondiscriminatory excise tax intended to complement the consumers sales tax on gasoline or special fuel. A barge towboat navigating in West Virginia waters would not be subject to the tax to the extent it paid sales tax on the fuel in West

Virginia or another state. Further, the tax is imposed on *all* motor carriers, including buses, tractor trucks, motor tractors, trucks with more than two axles, airlines, and locomotives.

Additionally, the fuel use tax applies only to barges and watercraft actually consuming or using gasoline or special fuel within this state and not to watercraft propelled by some other means, *i.e.,* current or coal-fired generator. If the tax were, in fact, a duty of tonnage, it would apply to all commercial watercraft, regardless of their mean of propulsion. Further, the tax is not related to the tonnage of the vessel. Appellant contends that the amount of fuel used or consumed by watercraft in West Virginia increases as the size and weight of the boat increases. For two boats operating in a vacuum, this is true, but this has no bearing on the constitutional validity of the West Virginia tax. For instance, a large towboat pushing four empty barges downstream at five knots would consume considerably less fuel than a medium-sized towboat pushing four coal-laden barges upstream at the same speed. Additionally, a properly tuned engine would consume less fuel than an engine in need of adjustment.

West Virginia's fuel use tax is simply not a "duty of tonnage" in the constitutional sense of that term. Here there is no duty or charge on the entry into a port of this state or right of navigation on West Virginia waters. Despite the broad language cited by the appellant from *Clyde Mallory Lines,* that "the prohibition against tonnage duties has been deemed to embrace all taxes and duties regardless of their name or form," the tonnage duty prohibition does not exempt watercraft from all state tax burdens. *See, e.g., Huse v. Glover,* 119 U.S. 543 (1886); *Ott, supra; Transportation Co. v. City of Parkersburg,* 107 U.S. 691 (1883).

Appellant further contends that the dispositive factors in each case addressed by this Court is the presence or absence of an identifiable "quid pro quo" for which

the state is justified in demanding compensation. However, as discussed previously, this test is only applied when a toll or charge is made on a specific government facility. The West Virginia tax is not in conflict with the duty of tonnage prohibition.

V. THE FUEL USE TAX IS NOT A CHARGE OR TOLL ON THE USE OF NAVIGABLE WATERS LYING IN WEST VIRGINIA, AND IS NOT PROHIBITED BY EITHER THE NORTHWEST ORDINANCE OR THE VIRGINIA COMPACT.

The appellant argues that the fuel use tax is invalidated by a pair of eighteenth-century compacts: the Northwest Ordinance of 1787 and the Virginia Compact of 1789. Appellant contends that the language regarding the freedom of the subject navigable waterways requires that the fuel use tax be invalidated. Claims that the Northwest Ordinance prohibited all charges or taxes have been routinely rejected by the courts. Appellant's claim should be summarily rejected by this Court for want of a substantial federal question.

The West Virginia Supreme Court of Appeals has held that the Northwest Ordinance and the Virginia Compact were superceded by the adoption of the United States Constitution and that these territorial compacts do not limit West Virginia's sovereignty. *American Barge Line v. Koontz,* 136 W. Va. 747, 68 S.E.2d 56 (1951). The West Virginia court further held that neither could limit the levy or collection of a state carrier income tax on barge companies. In so holding, the West Virginia court cited and relied upon *Economy Light & Power Company v. United States,* 256 U.S. 113 (1921). The appellant claims that the West Virginia decision failed to recognize the full impact of *Economy Light.* However, this is not the case.

The State of West Virginia was admitted to the Union by an Act of Congress, passed December 31, 1862, which conditionally admitted this State "into the Union on an

equal footing with the original States in all respects whatever * * *." *American Barge Line,* 136 W. Va. at 757, 68 S.E.2d at 62. In *Economy Light,* Justice Pitney, in referring to several cases on the subject of the Northwest Ordinance, holding its provisions would not control the authority and powers of the state after her admission, stated:

> "[A] state formed out of a part of the Northwest Territory has the same power to regulate navigable waters within its borders that is possessed by other states of the Union; *that is to say, until Congress intervenes, the power of the state, locally exerted, is plenary;* nevertheless, where the navigation serves commerce among the states or with foreign nations, Congress has the supreme power when it chooses to act, and is not prevented, by anything the states may have done from assuming entire control of the matter." 256 U.S. at 120. (Emphasis added.)

Further, the term "forever free" does not mean without charge. Rather, it refers to the accessibility of navigable waters without discrimination. *Indiana Port Commission v. Bethlehem Steel Corp.,* 534 F. Supp. 858 (1981). In *Indiana Port Commission,* the court addressed a challenge under the Northwest Ordinance's prohibition on "taxes, imposts or duties" to a harbor service charge imposed on watercraft using the Burns Water Harbor. The court also noted that objections that the Northwest Ordinance prohibited all charges or taxes have been expressly rejected by the courts. *See, e.g., Huse v. Glover, supra; Sands v. Manistee River Improvement Company,* 123 U.S. 288 (1887).

In any event, if the appellant is correct in its expansive reading of *Economy Light,* and the sovereignty of West Virginia is impaired by the Northwest Ordinance, and that it was not superceded by the adoption of the Constitution of the United States, it still does not invalidate the fuel use tax. The West Virginia tax is not a "tax,

duty or impost'' prohibited by the Northwest Ordinance. This document proclaiming freedom on navigable rivers contemplates, like the ''duty of tonnage,'' a toll or charge on the right of navigation. As previously noted, the fuel use tax is not such a toll or a charge.

The issue with respect to the Virginia Compact, a statute enacted by the Commonwealth of Virginia approximately 74 years before West Virginia was admitted into the Union, does not present a federal question because it is not a case arising under the Constitution, treaties, or laws of the United States. 28 U.S.C. § 1257(2). As a matter of state law, ''West Virginia is not limited in her sovereignty by the enactment of [the Virginia Compact] * * * before the West Virginia was admitted into the Union by the Congress of the United States of America and thereby placed on an equal footing with other states 'in all respects whatever.' '' *American Barge,* 136 W. Va. at 758, 68 S.E.2d at 62. Therefore, with respect to the Virginia Compact, the judgment of the West Virginia court rests upon an adequate nonfederal basis.

———o———

CONCLUSION

The appeal should be dismissed, or, in the alternative, the judgment of the Circuit Court of Kanawha County, West Virginia, with respect to the holding that the statute is constitutional and valid in every respect, should be affirmed.

Respectfully submitted,

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APPENDICES

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APPENDIX A

OTHER RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, Section 1, of the United States Constitution provides:

> "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

Article III, Section 2, Clause 1, of the United States Constitution, in pertinent part, provides:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority * * *."

W. Va. Code § 11-10-10 (1986), in pertinent part, provides:

> "When a petition for reassessment provided for in section eight [§ 11-10-8] of this article, or a petition for refund or credit provided for in section fourteen [§ 11-10-14] of this article, is filed within the time prescribed by said sections for such filing, or a hearing is requested pursuant to the provisions of any other article of this chapter which is administered under this article, the tax commissioner shall assign a time and place for a hearing upon the same and shall notify the petitioner of such hearing by written notice at least twenty days in advance thereof. Such hearing shall be held within ninety days from the date of filing the petition or other written request for hearing

unless continued by agreement of the parties or by the tax commissioner for good cause.

"The hearing shall be informal and shall be conducted in an impartial manner by the tax commissioner or a hearing examiner designated by him. If the hearing is on a petition for reassessment the burden of proof shall be upon the taxpayer to show the assessment is incorrect and contrary to law, either in whole or in part. If the hearing is on a petition for refund or credit, the petitioner shall also have the burden of proof.

"After any hearing as above provided for, the tax commissioner shall, within a reasonable time, give notice in writing of his decision. Unless an appeal from the decision of the tax commissioner rendered in any such hearing is taken, pursuant to the provisions of section ten [§ 11-10-10] of this article, within sixty days after service of such notice, the tax commissioner's decision shall become final and conclusive and not subject to either administrative or judicial review. The amount, if any, due the State under such decision shall be due and payable on the day following the date upon which such decision becomes final. The amount, if any, due the taxpayer under such decision shall be promptly refunded, or the same may be credited pursuant to section fourteen of this article."

W. Va. Code § 11-10-10 (1986), in pertinent part, provides:

"(a) *Right of appeal.*—A taxpayer may appeal the administrative decision of the tax commissioner issued under section nine or fourteen [§ 11-10-9 or § 11-10-14] of this article, by taking an appeal to the circuit courts of this state within sixty days after being served with notice of the administrative decision.

* * *

"(e) *Hearing of appeal.*—The court shall hear the appeal and determine anew all questions submitted to it on appeal from the determination of the tax

commissioner. In such appeal a certified copy of the tax commissioner's notice of assessment or amended or supplemental assessment and administrative decision thereon shall be admissible and shall constitute prima facie evidence of the tax due under the provisions of those articles of this chapter to which this article is applicable. The court shall render its decree thereon and a certified copy of said decree shall be filed by the clerk of the court with the tax commissioner who shall then correct the assessment in accordance with the decree. An appeal may be taken by the taxpayer or the tax commissioner to the supreme court of appeals of this state."

W. Va. Code § 11-10-14, in pertinent part, provides:

"(a) *Refunds or credits of overpayments.*—In the case of overpayment of any tax, additions to tax, penalties or interest imposed by this article or any of the other articles of this chapter to which this article is applicable, the tax commissioner shall, subject to the provisions of this article, refund to the taxpayer the amount of the overpayment or, if the taxpayer so elects, apply the same as a credit against the taxpayer's liability for such tax for other periods. The refund or credit shall include any interest due the taxpayer under the provisions of section seventeen [§ 11-10-17] of this article.

* * *

"(c) *Claims for refund or credit.*—No refund or credit shall be made unless the taxpayer has timely filed a claim for refund or credit with the tax commissioner. A person against whom an assessment or an administrative decision has become final shall not be entitled to file a claim for refund or credit with the tax commissioner as prescribed herein. The tax commissioner shall determine the taxpayer's claim and notify the taxpayer in writing of his determination.

"(d) *Petition for refund or credit; hearing.*—If the taxpayer is not satisfied with the tax commis-

sioner's determination of his claim for refund or credit, or if the tax commissioner has not determined the taxpayer's claim within ninety days after such claim was filed, or six months in the case of claims for refund or credit of the taxes imposed by articles twenty-one and twenty-four [§§ 11-21-1 et seq. and 11-24-1 et seq.] of this chapter, after the filing thereof, the taxpayer may file with the tax commissioner, either personally or by certified mail, a petition for refund or credit: Provided, that no petition for refund or credit may be filed more than sixty days after the taxpayer is served with notice of denial of his claim. The petition for refund or credit shall be in writing, verified under oath by said taxpayer or his duly authorized agent having knowledge of the facts, and shall set forth with particularity the items of the determination objected to, together with the reasons for the objections. When a petition for refund or credit is properly filed, the procedures for hearing and for decision prescribed in section nine [§ 11-10-9] shall be followed.

"(e) *Appeal.*—An appeal from the tax commissioner's decision upon the petition for refund or credit may be taken by the taxpayer in the same manner and under the same procedure as that set forth in section eleven [§ 11-10-11] relating to an appeal from the tax commissioner's decision on a petition for reassessment, but no bond shall be required of the taxpayer.

"(f) *Decision of the court.*—Where the appeal is to review an administrative decision on a petition for refund or credit, the court may determine the legal rights of the parties but in no event shall it enter a judgment for money.

* * *

"(i) *Remedy exclusive.*—The procedure provided by this section shall constitute the sole method of obtaining any refund or any credit, it being the intent hereof that the procedure set forth in this article shall

be in lieu of any other remedy, including the uniform declaratory judgments act embodied in article thirteen [§ 55-13-1 et seq.], chapter fifty-five of this Code and the provisions of section two-a [§ 11-1-2a], article one of this chapter.

"(j) *Applicability of this section.*—The provisions of this section shall apply to refunds or credits of any tax, additions to tax, penalties or interest imposed by any article of this chapter to which this article is applicable, for any refund or credit sought after the first day of July, one thousand nine hundred seventy-eight, irrespective of whether the claim of refund or credit is for a tax period ending prior to that date."

Former W. Va. Code § 11-10A-8(a) (1981) provided:

"(a) *Use tax credit.*—Each purchaser liable for a use tax on tangible personal property shall be entitled to full credit for the combined amount or amounts of legally imposed sales or use taxes paid by him with respect to the same property to another state and any subdivision thereof. The credit shall be applied first against the amount of any use tax due the state, and any unused portion of the credit shall then be applied against the amount of any use tax due a subdivision."

W. Va. Code § 55-13-1 provides:

"Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree."

W. Va. Code § 55-13-2 provides:

"Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder."

W. Va. Code § 55-13-9 provides:

"When a proceeding under this article involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending."

W. Va. Code § 55-13-11 provides:

"When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general of the State shall also be served with a copy of the proceeding and be entitled to be heard."

W. Va. Code § 55-13-13 provides:

"The word 'person,' wherever used in this article, shall be construed to mean any person, partnership, joint-stock company, unincorporated association or society, or municipal or other corporation of any character whatsoever."

W. Va. Code § 55-13-15 provides:

"This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees."

W. Va. Code § 55-13-16 provides:

"This article may be cited as the 'Uniform Declaratory Judgments Act.' "

APPENDIX B

IN THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA

WATERWAYS ASSOCIATION
OF PITTSBURGH, a
Pennsylvania corporation,

Plaintiff,

v. CIVIL ACTION NO. 84-C-2814

HERSCHEL H. ROSE, III, Tax
Commissioner of the
State of West Virginia,

Defendant.

COMPLAINT FOR DECLARATORY RELIEF

1. This is a Complaint for a declaratory judgment filed pursuant to the provisions of Chapter 55, Article 13, Section 1, *et seq.* of the Code of West Virginia of 1931, as amended, ("West Virginia Code") and the provisions of Rule 57 of the West Virginia Rules of Civil Procedure.

2. Plaintiff is Waterways Association of Pittsburgh, a nonprofit membership association incorporated under the laws of the State of Pennsylvania.

3. Defendant, Herschel H. Rose, III ("Rose" or "State Tax Commissioner"), is the Tax Commissioner of the State of West Virginia, having been duly appointed to such office as required by the Constitution and laws of the State of West Virginia.

3. [sic] On February 18, 1983, the West Virginia Legislature passed House Bill 1657, amending Articles 14, 14A, 15 and 15A of Chapter 11 of the West Virginia Code

(hereinafter sometimes referred to as "House Bill 1657"). House Bill 1657 became effective April 1, 1983, and provides for imposition of a tax on the sale, use or consumption in West Virginia of gasoline or special fuel.

4. West Virginia Code § 11-15A-13(a)(2) imposes an excise tax on the "use or consumption in this State of gasoline or special fuel purchased outside this State at the rate of 5% of the average wholesale price of such gasoline or special fuel."

5. West Virginia Code § 11-15A-13(c)(1) delegates to the State Tax Commissioner the authority to "determine the average wholesale price of gasoline and special fuel for each annual period, on the basis of sales data gathered for the preceding period of the first day of July through the thirty-first day of October."

6. West Virginia Code § 11-15A-13(c)(2) provides that the "average wholesale price" shall mean the statewide average per gallon wholesale price "as determined by the Tax Commissioner from information furnished by distributors of gasoline and special fuel in this State or such other information regarding wholesale selling prices as the tax commissioner may gather, or a combination of such information...."

7. West Virginia Code § 11-15A-13(d) states:

> (d) *Computation of Tax Due from Motor Carriers.*—Every person who operates or causes to be operated a motor carrier in this State shall pay the tax imposed by this section of the average wholesale price of all gallons of gasoline or special fuel used in the operation of any motor carrier within this State, under the following rules:

(1) The total amount of gasoline or special fuel used in the operation of the motor carrier within this State shall be that proportion of the total amount of gasoline and special fuel used in any motor carrier's operations within and without this State, that the total number of miles traveled within this State bears to the total number of miles traveled within and without this State.

(2) A motor carrier shall first determine the gross amount of tax due under this section on the average wholesale value, determined under subsection (c), of all gasoline and special fuel used in the operation of the motor carrier within this State during the preceding quarter, as if all gasoline and special fuel had been purchased outside this State.

(3) Next, the taxpayer shall determine the total tax paid under article fifteen of this chapter on all gasoline and special fuel purchased in this State for use in the operation of the motor carrier.

(4) The difference between (2) and (3) is the amount of tax due under this article when (2) is greater than (3), or the amount to be refunded or credited to the motor carrier when (3) is greater than (2), which refund or credit shall be allowed in the same manner and under the same conditions as a refund or credit is allowed for the tax imposed by article fourteen-A of this chapter.

8. West Virginia Code § 11-15-18(c)(6) defines "motor carrier" to include "any aircraft, barge or other watercraft or locomotive transporting passengers or freight in or through this State."

9. Some of plaintiff's members are motor carriers within the meaning of West Virginia Code § 11-15-18(c)(6) and are in the business of transporting products by barge and other watercraft in interstate commerce on those

parts of the Ohio River that are in the State of West Virginia, on other navigable rivers of the State, and on the Ohio River and other navigable rivers outside West Virginia.

10. Certain of plaintiff's members operating in West Virginia have filed returns required under the provisions of House Bill 1657 and paid the tax on fuel used in their river transportation business in West Virginia even though they believe such tax to be invalid.

11. The State Tax Commissioner is empowered by House Bill 1657 and by the provisions of Chapter 11 of the West Virginia Code to administer and enforce the tax imposed by said legislation.

COUNT I

12. The tax imposed by House Bill 1657 is a direct burden upon an instrumentality of interstate commerce in violation of Article I, Section 8, Clause 3 of the United States Constitution (the "Commerce Clause").

WHEREFORE, plaintiff Waterways Association of Pittsburgh requests that this Court determine that the tax imposed by House Bill 1657 is unconstitutional, and without effect and that the Court enter an Order declaring the said tax to be invalid and unenforceable against plaintiff's members and all others similiarly affected and directing defendant State Tax Commissioner to refund to plaintiff's members all taxes paid under the provisions of said House Bill 1657 on fuel used in their river transportation business in West Virginia.

COUNT II

As an alternative to the relief sought in Count I of the Complaint, plaintiff avers:

13. The taxes paid by plaintiff's members as required by West Virginia Code § 11-15A-13 do not bear any fair relationship to the benefits they receive, if any, from the State of West Virginia.

14. The tax imposed by House Bill 1657 is an unconstitutional burden on interstate commerce in violation of the Commerce Clause and Amendment XIV, Section 1 of the United States Constitution (the "Due Process Clause") because the tax is not fairly related to services provided to plaintiff's members by the State of West Virginia.

WHEREFORE, plaintiff Waterways Association of Pittsburgh requests that this Court determine that West Virginia Code §§ 11-15-18 and 11-15A-13 are unconstitutional and without effect and that the Court enter an Order declaring the same to be invalid and unenforceable against plaintiff's members and all others similarly affected and directing defendant State Tax Commissioner to refund to plaintiff's members all taxes paid under the provisions of said House Bill 1657 on fuel used in their river transportation business in West Virginia.

COUNT III

As an alternative to the relief sought in Counts I and II of the Complaint, plaintiff avers:

15. The tax imposed by West Virginia Code § 11-15A-13 discriminates against interstate commerce in vio-

lation of Commerce Clause and Due Process Clause of the United States Constitution because it allows a credit against the tax with respect to tax paid on fuel purchased in this State but allows no similar credit for tax that is or could be imposed by other jurisdictions on fuel purchased outside this State.

WHEREFORE, plaintiff Waterways Association of Pittsburgh requests that this Court determine that West Virginia Code § 11-15A-13 is unconstitutional and without effect and that the Court enter an Order declaring the same to be invalid and unenforceable against plaintiff's members and all others similiarly affected and directing defendant State Tax Commissioner to refund to plaintiff's members all taxes paid under the provisions of said House Bill 1657 on fuel used in their river transportation business in West Virginia.

COUNT IV

As an alternative to the relief sought in Counts I, II, and III of the Complaint, plaintiff avers:

16. West Virginia Code § 11-15A-13(c)(2) provides that the "average wholesale price" that is the basis for the tax imposed by West Virginia Code § 11-15A-13 is calculated from data supplied by distributors of gasoline and diesel fuel.

17. Plaintiff's members use a less expensive fuel in their operations than the fuel used as the basis for the Tax Commissioner's calculation of the average wholesale price that is, in turn, the basis for calculating the tax.

18. West Virginia Code § 11-15A-13(c)(2) discriminates without rational basis against plaintiff's members

in violation of the equal and uniform taxation requirements of Article X, Section 1 of the West Virginia Constitution because it requires plaintiff's members to pay a tax based on a higher, more expensive grade of fuel than plaintiff's members use in their operations.

WHEREFORE, plaintiff Waterways Association of Pittsburgh requests that this Court determine that West Virginia Code § 11-15A-13(c)(2) is unconstitutional and without effect and that the Court enter an Order declaring the same to be invalid and unenforceable against plaintiff's members and all others similiarly affected and directing defendant State Tax Commissioner to refund to plaintiff's members all taxes paid under the provisions of said House Hill 1657 on fuel used in their river transportation business in West Virginia.

COUNT V

As an alternative to the relief sought in Counts I, II, III and IV of the Complaint, plaintiff avers:

19. The delegation of authority to the State Tax Commissioner contained in West Virginia Code § 11-15A-13 to determine the average wholesale price of gasoline on the basis of "information furnished by distributors of gasoline or special fuel in this state, or such other information regarding wholesale prices as the tax commissioner may gather, or a combination of such information" is an unlawful delegation of the taxing power of the Legislature of the State of West Virginia and in violation of Article V, Section 1 of the West Virginia Constitution.

WHEREFORE, plaintiff Waterways Association of Pittsburgh requests that this Court determine that West Virginia Code §§ 11-15-18 and 11-15A-13 are unconstitutional and without effect and that the Court enter an Order declaring the same to be invalid and unenforceable against plaintiff's members and all others similarly affected and directing defendant State Tax Commissioner to refund to plaintiff's members all taxes paid under the provisions of said House Bill 1657 on fuel used in their river transportation business in West Virginia.

COUNT VI

As an alternative to the relief sought in Counts I, II, III, IV and V of the Complaint, plaintiff avers:

20. The tax imposed by House Bill 1657 passed by the Legislature of West Virginia and administered by Rose is prohibited by Article I, Section 10 of the United States Constitution and is therefore illegal and without effect because it imposes a charge on watercraft operating on the navigable waters of the State of West Virginia without any corresponding benefit and as such constitutes an unlawful Duty of Tonnage.

WHEREFORE, plaintiff Waterways Association of Pittsburgh requests that this Court determine that West Virginia Code §§ 11-15-18 and 11-15A-13 impose a tax prohibited by the United States Constitution and are therefore unconstitutional and without effect and that the Court enter an Order declaring the same to be invalid and unenforceable against plaintiff's members and all

others similarly affected and directing defendant State Tax Commissioner to refund to plaintiff's members all taxes paid under the provisions of said House Bill 1657 on fuel used in their river transportation business in West Virginia.

COUNT VII

As an alternative to the relief sought in Counts I, II, III, IV, V and VI of the Complaint, plaintiff avers:

21. The tax imposed by House Bill 1657 passed by the Legislature of West Virginia and administered by Rose violates the spirit and terms of the Northwest Ordinance and Virginia Compact and is therefore illegal and without effect because it is contrary to provisions in those documents which declare that all navigable waters leading into the Mississippi River, including the Ohio River, shall be "forever free."

WHEREFORE, plaintiff Waterways Association of Pittsburgh requests that this Court determine that West Virginia Code §§ 11-15-18 and 11-15A-13 impose a tax prohibited by the Northwest Ordinance and the Virginia Compact and are therefore without effect and that the Court enter an Order declaring the same to be invalid and unenforceable against plaintiff's members and all others similarly affected and directing defendant State Tax Commissioner to refund to plaintiff's members all taxes paid under the provisions of said House Bill 1657 on fuel

used in their river transportation business in West Virginia.

WATERWAYS ASSOCIATION
OF PITTSBURGH

By SPILMAN, THOMAS, BATTLE &
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APPENDIX C

IN THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA

WATERWAYS ASSOCIATION
OF PITTSBURGH, a
Pennsylvania corporation,

Plaintiff,

v. CIVIL ACTION NO. 84-C-2814

HERSCHEL H. ROSE, III, Tax
Commissioner of the
State of West Virginia,

Defendant.

ANSWER OF THE DEFENDANT STATE TAX
COMMISSIONER OF WEST VIRGINIA

First Defense

1. Defendant State Tax Commissioner admits the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, and 11 of the complaint.

2. Defendant State Tax Commissioner is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 10 of the Complaint, for the reason that the defendant has no knowledge as to the identity of the members of the plaintiff association and therefore is unable to either admit or deny such allegations.

3. The defendant State Tax Commissioner denies the allegations contained in Count I, Paragraph 2 of the complaint. The defendant further asserts that the tax imposed by West Virginia Code § 11-15A-13(a) does not vi-

olate Article 1, Section 8, Clause 3 of the Constitution of the United States (the Commerce Clause); that such tax is fairly apportioned under the statutory formula set out in West Virginia Code § 11-15A-13(d); that the plaintiffs have a substantial nexus with the State of West Virginia; and that the tax imposed by West Virginia Code § 11-15A-13(a) is fairly related to the services provided by the State of West Virginia.

4. The defendant State Tax Commissioner denies the allegations contained in Paragraphs 13 and 14, Count II, of the complaint.

5. The defendant State Tax Commissioner denies the allegations contained in Paragraph 15, Count III, of the complaint, and further asserts that the provisions of Chapter 11, Article 10A of the West Virginia Code (the Multi-State Tax Compact) and more specifically W. Va. Code § 11-10A-8(a) provides a credit with respect to fuel purchased in another state.

6. The defendant State Tax Commissioner admits the allegations contained in Paragraph 16, Count IV of the complaint.

7. The defendant State Tax Commissioner is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 17, Count IV of the complaint and therefore neither admits nor denies such allegations, but demands strict proof thereof.

8. The defendant State Tax Commissioner denies the allegations contained in Paragraph 18, Count IV of the complaint.

9. The defendant State Tax Commissioner denies the allegations contained in Paragraph 19, Count V of the complaint.

10. The defendant State Tax Commissioner of West Virginia denies the allegations contained in Paragraph 20, Count VI, of the complaint.

11. The defendant State Tax Commissioner denies the allegations contained in Paragraph 21, Count VII, of the complaint.

Second Defense

12. The complaint fails to state a claim upon which relief can be granted.

Third Defense

13. The relief for which the plaintiffs pray in Counts I, II, III, IV, V, VI, and VII of the complaint, specifically, refund of all taxes paid by the plaintiffs' members pursuant to W. Va. Code § 11-15A-13(a) and House Bill 1657 is absolutely unavailable under the provisions of Chapter 11, Article 10, of the West Virginia Code. § 11-10-14 sets out the procedures under which must be followed to obtain a refund of state tax, 11-10-14(i) is as follows:

> "(i) Remedy exclusive—The procedure provided by this section shall constitute the sole method of obtaining any refund or any credit, it being the intent hereof that the procedure set forth in this article shall be in lieu of any other remedy, *including the uniform declaratory judgments act embodied in article thirteen* [§ *55-13-1 et seq.*], *chapter fifty-five of this Code* and the provisions of section two-a [§ 11-1-2a], article one of this chapter." (Emphasis Added)

WHEREFORE, defendant State Tax Commissioner of West Virginia demands judgment:

(a) Dismissing in all respect the plaintiff's complaint; and,

(b) Awarding the defendants his costs in this action and such other and further relief as the Court may deem just and proper.

HERSCHEL H. ROSE, III
State Tax Commissioner,
State of West Virginia

By Counsel

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Supreme Court, U.S.
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No. 86-1758

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WATERWAYS ASSOCIATION OF PITTSBURGH,
Appellant,

v.

HERSCHEL H. ROSE, III, STATE TAX COMMISSIONER OF WEST VIRGINIA,
Appellee,

On Appeal from the Circuit Court of Kanawha County of West Virginia

REPLY BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

I WHETHER A CASE OR CONTROVERSY IS PRESENTED.

II WHETHER APPELLANT, AN ASSOCIATION, HAS STANDING TO PRESENT A JUSTICIABLE CASE ON BEHALF OF ITS MEMBERS.

III WHETHER THIS COURT SHOULD CONSIDER APPELLANT'S ARGUMENT OF PREEMPTION.

IV WHETHER THE STATE OF WEST VIRGINIA PROVIDES SUFFICIENT BENEFITS TO APPELLANT'S WATER TRANSPORTATION BUSINESS TO JUSTIFY ITS FUEL USE TAX ON SUCH BUSINESS.

V WHETHER WEST VIRGINIA'S FUEL USE TAX IS A DUTY OF TONNAGE.

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No. 86-1758

IN THE

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OCTOBER TERM, 1986

WATERWAYS ASSOCIATION OF PITTSBURGH,
Appellant,

v.

HERSCHEL H. ROSE, III, STATE TAX COMMISSIONER OF WEST VIRGINIA,
Appellee,

On Appeal from the Circuit Court of Kanawha County of West Virginia

---

REPLY BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

PRELIMINARY STATEMENT

THIS CASE PRESENTS FEDERAL QUESTIONS OF NATIONAL IMPORTANCE WHICH POSITIONS A STATE TAX STATUTE IN CONFLICT WITH A LONG STANDING FEDERAL POLICY OF ESTABLISHING, MAINTAINING, IMPROVING, AND REGULATING A NAVIGABLE INLAND WATERWAY SYSTEM BY IMPOSING A TAX UPON AN INSTRUMENTALITY OF INTERSTATE COMMERCE.

When state statutes bring into focus such conflicts, the burden falls upon the state to demonstrate that such taxation does not place an unreasonable burden upon interstate commerce. *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). Rather than meet its burden, Appellee would have

this case disposed of on procedural grounds and concludes that the case does not present an issue "worthy of this Court's time." To the contrary, this case presents fundamental questions which must be revisited from time to time to provide guidelines for taxpayers and taxing authorities alike to balance the competing interests of the state and federal governments and to preserve the integrity of the Commerce Clause. *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945).

For the following reasons, this Court should note probable jurisdiction:

A CASE OR CONTROVERSY IS PRESENTED BY AN APPELLANT WITH STANDING TO BE HEARD BASED UPON REAL LIFE EXPERIENCES OF REAL TAXPAYERS

The Appellant's case is based upon the actual experience of real life by real taxpayers. There is nothing hypothetical about filing a tax return and paying taxes pursuant to a state statute which the taxpayer believes to be unconstitutional. The facts have been stipulated by the parties as a part of the State Court proceeding, were recited as a finding of fact in the decision being appealed, and are, therefore, a matter of record before this Court. (J.S. 1 through 27 inclusive, Appendix C). For example, among other things the parties stipulated:

> "Some of Plaintiff's [Appellant's] members are motor carriers within the meaning of West Virginia Code Section 11-15-18(c)(6) and are in the business of transporting products by barge and other watercraft in interstate commerce on those parts of the Ohio River that are in the State of West Virginia, ..." (Brackets added).
>
> "The State Tax Commissioner requires the tax imposed by West Virginia Code Section 11-15A-13(a) to be paid with respect to all gasoline and special fuel used and consumed by barge transportation operating in West Virginia waters." (J.S. 21).
>
> "Certain of Plaintiff's [Appellant's] members operating in West Virginia have filed returns required under the

provisions of House Bill 1657 and paid tax on fuel purchased outside West Virginia and used in their river transportation business in West Virginia. . . ." (Brackets added).

"As a result of House Bill 1657 codified as West Virginia Code Section 11-15A-13(a)(2), the state collects from watercraft . . . approximately one million dollars per year. . . ." (J.S. 27).

AN APPEAL FROM A STATE COURT DECLARATORY JUDGMENT PRESENTS A CASE OR CONTROVERSY WHERE THERE IS AN ACTUAL AND ACUTE CONTROVERSY

This action was commenced and prosecuted within the state courts of West Virginia pursuant to the Uniform Declaratory Judgment Act, *Chapter 55, Article 13, Section 1 etc. of the Code of West Virginia.* For purposes of establishing a "case or controversy" within the meaning of Article III of the Constitution, this Court has made it clear on more than one occasion that the constitutionality of a statute may be challenged by way of a complaint for declaratory judgment by showing: that the Suitor is affected prejudicially by the application or enforcement of the statute, *State of Texas* v. *Interstate Commerce Commission and Railroad Labor Board*, 258 U.S. 158 (1922); and that its sanctions have been set in motion against the Suitor. *International Longshoremen's & Warehousemen's Union* v. *Boyd*, 347 U.S. 222 (1954).

The statute imposes on Appellant's members a tax on fuel consumed while navigating the inland waterways in connection with transporting cargo in interstate commerce. The use tax (which is in addition to the federal use tax on the same activity) is clearly prejudicial to Appellant. Moreover, its sanctions have been placed in motion in that the Tax Commissioner of West Virginia has been charged with the duty to enforce the statute. (J.S. 25). The parties have jointly stipulated the statute at issue, (J.S. 3) that Appellant's members are af-

fected prejudically by the application or enforcement of the statute (J.S. 21) and that its sanctions have been set in motion against Appellant's members. (J.S. 24).

AN ASSOCIATION WHOSE MEMBERS OR MEMBER IS SUFFERING AN IMMEDIATE OR THREATENED INJURY AS A RESULT OF THE CHALLENGED ACTION HAS STANDING IF THE MEMBER WOULD HAVE HAD STANDING TO MAKE OUT A JUSTICIABLE CASE

The Appellee next argues that the Appellant has no standing to assert the rights of non-parties to this proceeding.

The parties stipulated and the court below found that:

> "Certain of Plaintiff's [Appellant's] members operating in West Virginia have filed returns and paid tax on fuel purchased outside of West Virginia and used in . . . West Virginia . . . ."(J.S. 24). (Brackets supplied).

The Appellant alleged in its Complaint that the statute imposing the tax is unconstitutional. The Association, acting as a conduit for the benefit of its members placed the constitutionality of the statute at issue just as the individual member or members would have done on an individual basis.

In *Warth* v. *Seldin*, 422 U.S. 490 (1975), this Court addressed the issue of standing of an association to maintain a suit on behalf of its members where it stated:

> "Even in the absence of injury to itself an association may have standing solely as the representative of its members, . . . the association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit . . . . So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction." 422 U.S., at 511.

This Court held in that case that the association did not have standing because the injury to its members was not shown in sufficient immediacy to warrant judicial intervention. In this case, however, the parties have stipulated that the members of the association have paid taxes pursuant to the plain requirements of a statute which they have alleged to be unconstitutional. Certainly the individual member of the association who has complied with the statute by filing its return and paying the tax would have standing to present a justiciable case. Moreover, the threshold relief sought is to have the statute declared unconstitutional and thus the individual participation of each injured party is not indispensable to the proper resolution of the cause. The case may be remanded to the State Court to address the matter of refunds or other relief as this Court has done in prior cases. *American Trucking Association, Inc., et al., Appellants* v. *James I. Scheiner, Secretary, Department of Revenue, et al.*, No. 86-357 Decided June 23, 1987 ____ U.S. ____, (1987). *Boston Stock Exchange* v. *State Tax Commissioner*, 429 U.S. 318 (1977); *Hunt* v. *Washington Apple Advertising Commission*, 432 U.S. 333 (1977).

The Appellant has prayed for relief from the statute in question by requesting the Court to determine that:

> "The tax imposed by House Bill 1657 is unconstitutional and without effect and that the Court enter an order declaring the said tax to be invalid and unenforceable against Appellant's members and all others similarly affected . . . ." (Count I Complaint).

This Court has held that while the ordinary course of judicial procedure results in a judgment requiring the award of process or execution to carry it into effect, such relief is *not* an indispensable adjunct to the exercise of the judicial function. *Nashville, C & SLR Co.* v. *Wallace*, 288 U.S. 249, 77 L Ed. 730 (1933). Accordingly, this Court is free to decide the underlying federal question as to the constitutionality of the statute and remand the case to the State Courts for further proceedings as to specific relief regarding actual refunds of taxes.

THIS COURT MAY CONSIDER APPELLANT'S PREEMPTION ARGUMENT SINCE THE CONCEPT OF PREEMPTION IS INHERENT WITHIN THE COMMERCE CLAUSE

The Appellee next argues that Appellant is precluded from raising the issue or preemption as this issue was not raised in the State Court proceeding. The Appellee again ignores the allegations in the Complaint and joint stipulation of the parties.

> "The United States Government has sole responsibility for regulation, servicing, and maintenance of the navigable waterways of which the Ohio, Kanawha, Big Sandy, and Monongahelia Rivers are a part. Article 1, Section 8, and Article 3, Section 2, Constitution of the United States, Title 33 U.S.C. Section 1; Title 49 U.S.C. Section et seq." (J.S. 18).

The court below accepted the joint stipulation and, therefore, considered these facts in connection with rendering its decision.

Although the term "preemption" was not used in the joint stipulation, the term "sole responsibility" would encompass the term "preemption." According to Webster, to "preempt" is to act to the exclusion of others while to have "sole responsibility" is to have exclusive responsibility. It is axiomatic that if government has sole responsibility, it also has the corresponding sole authority to discharge that responsibility. The concept of "preemption" is inherent within the agreed Stipulation as to the Commerce Clause argument and Appellee cannot at this late date disavow that admission.

In connection with carrying out its function of regulating and maintaining the navigable waterways, a federal tax has been imposed on fuel used by the same watercraft pursuant to Section 26 U.S.C. 4042 of the Internal Revenue Code. This should not be viewed as a new argument but is simply a dimension of the Commerce Clause argument.

Whether this Court would view the joint stipulation by the parties as having raised the preemption issue; whether this

Court would take judicial notice of the Federal tax statute, or whether it would choose to disregard the argument, it is still inescapable that the United States Government has sole power of taxation of interstate commerce in the absence of the state showing that such tax is within the parimeters permitted by this court. The state has not met its burden and would enlist the aid of this Court to avoid the task.

> "For a hundred years it has been accepted consitutional doctrine that the Commerce Clause, without the aid of Congressional Legislation thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court and not the State Legislature is under the Commerce Clause, the final arbitration of the competing demands of state and national interests." 325 U.S. at 769. *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945).

THE STATE OF WEST VIRGINIA PROVIDES NO BENEFITS TO APPELLANT'S WATER TRANSPORTATION BUSINESS

Section 11-15A-13(g) provides:

> "All tax collected under the provisions of this section . . . shall be deposited in the "road fund" . . . and shall be used only for the purpose of construction, reconstruction, maintanance, and repair of highways . . . ."

The parties have jointly stipulated that the sole responsibility for maintaining and regulating the waterways is assumed by the federal government. The fact that the watercraft pass through the state does not demonstate the kind of nexus that justifies a tax on interstate commerce. Actually, it is just the opposite. The very purpose of the Federal Government retaining control over inland navigable waterways is to insure that they remain open to promote the free flow of commerce without undue burdens of state taxation. As this Court pointed out in *McCulloch* v. *Maryland*, 4 Wheat 316 (1819) p. 326 "The power to tax is the power to destroy." The exer-

cise of such power by a state over an indispensable link in a chain of navigable waterways can indeed break the chain. If plying a navigable waterway while passing through a state is the only requirement to trigger a state use tax on fuel consumed, the next logical step is for the state to establish a toll booth on the rivers. This tax cannot meet the test set forth in *Evansville-Vanderburgh Airport Authority* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972), as the state statutes demonstrate that no other benefits are provided by the state to the water transportation passing through the state.

The burden is upon the state to demonstrate that revenue raised by the tax benefits the activity subjected to the tax. *Massachusetts* v. *United States*, 435 U.S. 444 (1978); *Complete Auto Transit, Inc. vs. Brady*, 430 U.S. 274 (1977).

The Appellant has demonstrated that: (1) the state has imposed a tax upon an instrumentality of interstate commerce which depends exclusively upon the inland waterways as its mode of transportation; (2) that the revenues raised are used for building highways within the state; and (3) that the federal government has the sole responsibility for maintaining, servicing, and regulating the inland waterways.

A PROHIBITED DUTY OF TONNAGE IS DETERMINED BY ITS EFFECT ON INTERSTATE COMMERCE

Appellee's argument on the duty of Tonnage issue is summarized by the assertion that the West Virginia fuel use tax "is simply not a 'duty of tonnage' in the constitutional sense of that term." (Appellee's Motion at 26). Further, Appellee asserts that the authorities relied on by Appellant are applicable only when a toll or charge is made for a specific government facility.

A recent description of the object of the Duty of Tonnage restriction appears in *Massachusetts* v. *United States*, supra wherein the Court stated that:

> ". . . the prohibition against duties on the privilege of entering ports is intended specifically to guard against local hindrances to trade and commerce by vessels. See

Packet Co. v. *Keokuk*, 95 U.S. 80, 85, 24 L.Ed. 377 (1877)."

While the case involved the issue of state immunity from a tax imposed by the Federal Government, the Court nonetheless reviewed the line of decisions interpreting the constitutional provisions which place limitations on the taxing power of government.

The cases that prohibit state levies "for the privilege of entering, trading in or lying in a port," regardless of the name or form such levies may take, *Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261, 265 (1935), carefully distinguish charges to reinburse the costs of improvements. *Clyde Mallory*, supra, at 266; *Keokuk Northern Line Packet Co.* v. *Keokuk*, 95 U.S. 80 (1877). The United States Supreme Court has stated that "(f)or outlays caused by such works the State may exact reasonable tolls." *Huse* v. *Glover*, 119 U.S. 543, 548 (1886). The State of West Virginia has provided no such "works" which entitle it to place a charge upon vessels for navigating the public waters.

The incidence of the tax challenged by Appellant is the consumption of the fuel, an indispensable necessity of river transportation. It burdens the voyage itself, the very center and irreducible minimum of the navigation process. The vessel starts burning fuel "at waters edge" and does so all the way to its destination. The economic burden of the state's exaction falls on the cargo, each item bearing a share proportioned in part to the distance of its transportation. The tax is clearly a levy on river transportation of cargo moved by barge, and thus a local hindrance to trade and commerce by vessels that the Duty of Tonnage prohibition is intended to guard against.

The focus of the United States Supreme Court in reviewing the limitations of the states to exercise their taxing power is on the practical effect of the challenged tax. *Commonwealth Edision Co.* v. *Montana*, 453 U.S. 609, 625 (1981). The practical effect of the tax on fuel consumed in vessels engaged in interstate river transportation is to unduly burden that

navigation and require payment for entering West Virginia waterways. This effect is prohibited by the Constitution.

CONCLUSION

Appellant has shown that there are no procedural barriers to the Court's acceptance of this case and that substantive Constitutional issues are presented. Therefore, the Court should note probable jurisdiction of this Appeal.

Respectfully submitted,

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